TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 1[illegible]

JAMES KNOTT, PETITIONER,

vs.

BOTANY WORSTED MILLS AND HENRY P. WINTER AND CHARLES F. SMILLIE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED NOVEMBER 16, 1903.
CERTIORARI AND RETURN FILED DECEMBER 21, 1903.

(16,720.)

(16,720.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 194.

JAMES KNOTT, PETITIONER,

vs.

BOTANY WORSTED MILLS AND HENRY P. WINTER AND CHARLES F. SMILLIE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 United States District Court, Southern District of New York.

BOTANY WORSTED MILLS, Libellant and Appellee,
vs.
JAMES KNOTT, Respondent and Appellant.

HENRY P. WINTER and CHARLES F. SMILLIE, Libellants and Appellees,
vs.
JAMES KNOTT, Respondent and Appellant.

Statement.

1895.
May 2. Libel filed (Botany worsted mills).
Aug. 15. Answer and interrogatories filed (Botany worsted mills).
Nov. 1. Libellant's answers to interrogatories filed (Botany worsted mills).
Sept. 24. Libel filed (Winter & Smillie).
1896.
May 29. Answer and interrogatories filed (Winter & Smillie).

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June 5. Cause tried before Hon. Addison Brown, U. S. district judge.
Oct. 15. Opinion rendered directing decree to be entered for libellants with reference to compute amount of damage.
Dec. 5. Final decree entered (Botany worsted mills).
7. Notice of appeal filed " " "
26. Assignment of errors filed " " "
Nov. 2. Final decree entered (Winter & Smillie).
17. Notice of appeal filed "
Dec. 26. Assignment of errors "

To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The libel and complaint of the Botany Worsted Mills, of Passaic, N. J., against James Knott, of Newcastle-on-Tyne, England, owner of the steamship *Portug-ese Prince*, in a cause of contract, civil and maritime, alleges as follows:

I. That your libellant is a corporation organized under the laws of the State of New Jersey, and carrying on business at Passaic, N. J.

II. That the respondent, James Knott, is, as your libellant is informed and believes, a resident of Newcastle-on-Tyne, England, and at the times herein mentioned was and now is the owner of the British steamship *Portug-ese Prince*.

III. That at all the times herein mentioned said steamship *Portug-ese Prince* was engaged in business as a common carrier.

IV. That on — about the 21st and 24th days of December, 1894,

there were shipped on board the said steamship *Portug-ese Prince* then lying at the port of Buenos Ayres, in the Argentine Republic, and bound for the port of New York, by the firm of Waetge & Schlief, 122 bales of wool, 53 thereof being marked "B. W.
3 M. pasto fuerte" and numbered 1 to 53 inclusive and 69 thereof marked "B. W. M. pasto fuerte supra" and numbered from 54 to 122 inclusive, the same being the property of your libellant, to be carried and transported to the port of New York, and there delivered to your libellant, and that thereupon the master or agents of said steamship *Portuguese Prince* signed bills of lading for said 122 bales of wool, in and by which they acknowledged the receipt thereof in good order and condition, and undertook and agreed to deliver the same in like good order and condition, at the port of New York, to order, for a freight agreed to be paid therefor, and that thereafter the said bills of lading were duly endorsed by the shippers and delivered to your libellant.

V. That thereafter said steamship sailed from the port of Buenos Ayres, with said wool on board, and arrived at the port of New York on or about the 30th day of March, 1895, and there delivered said 122 bales of wool, but not in the like good order and condition as received, 52 of said bales of wool, numbered 1, 2, 4, 5, 11, 12, 14, 16, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 53, 54, 55, 56, 57, 59, 60, 62, 63, 64, 66, 72, 73, 74, 75, 76, 78, 79, 81, 82, 84, 85, 86, 88, 89, 90, 91, 92, 99, 100, 112, 114, 117, being damaged and that the damage to said 152 bales of wool amounts to the sum of $1,049.31.

VI. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore, your libellant prays that process in due form of law, according to the course of this honorable court in cases of admiralty and maritime jurisdiction may issue against the respondent, James Knott, and in case he cannot be found, then that his goods and chattels be attached to the amount sued for, and that he may be required to appear and answer all and singular the matters aforesaid, and that this honorable court would be pleased to
4 decree the payment of the amount due to your libellant with interest and costs, and that it may have such other and further relief in the premises as in law and justice it may be entitled to receive.

GEORGE A. BLACK,
Proctor for Libellant, 44 Pine Street, New York City.

UNITED STATES OF AMERICA, }
District of New Jersey, } *ss:*

Carl Pfeil, being duly sworn, says that he is the secretary of the Botany worsted mills; that the foregoing libel is true of his own knowledge, except as to the matters therein stated on information and belief and as to those matters he believes it to be true.

C. PFEIL.

Sworn to before me, this 1st day of May, 1895.

CHARLES RUST,
[SEAL.] *Notary Public of New Jersey.*

(Endorsed:) Libel. Filed May 2, 1895.

To the Honorable Addison Brown, United States district judge for the southern district of New York:

The answer of James Knott, owner of the steamship *Portuguese Prince*, to the libel and complaint of the Botany Worsted Mills, in a cause of contract, civil and maritime, alleges as follows:

1. He admits the matters alleged in the first article of the libel.

2. He admits the matters alleged in the second article of the libel.

3. Answering the fourth article of the libel, defendant alleges that he has no knowledge or information sufficient to form a belief regarding the shipment of wool except the recitals contained in the bills of lading, which acknowledge that on or about the 21st and 24th days of December, 1894, there were shipped on board of said steamship *Portuguese Prince*, then lying at the port of Buenos Ayres, in the Argentine Republic, and bound to the port of New York, by the firm of Waetge & Schlief, 122 bales of wool, 53 thereof being marked "B. W. M. pasto fuerte" and numbered 1 to 53 inclusive, and 69 thereof being marked "B. W. M. pasto fuerte supra," and numbered from 54 to 122 inclusive, to be carried and transported to the port of New York; and that thereupon the agents of said steamship at Buenos Ayres signed bills of lading for said 122 bales of wool, in and by which they acknowledged the receipt thereof in apparent good order and condition, and undertook and agreed to deliver the same in the like order and condition at the port of New York, and to order, for a freight agreed to be paid therefor, and upon the terms, conditions, exceptions, and limitations contained in the said contract of carriage. He denies any knowledge or information sufficient to form a belief as to whether the said bales were the property
6 of the libellant at the time of shipment; but admits that thereafter said bills of lading were duly endorsed by the shippers and delivered to the libellant, and that at the time of delivery the said wool was the property of the libellant.

4. Answering the fifth article of the libel, he alleges that thereafter the said steamship sailed from the port of Buenos Ayres with said wool on board, and arrived at the port of New York on or about the 30th day of March, 1895, and there delivered said 122 bales of wool pursuant to the terms and provisions of the said bills of lading unto the libellant; and that at the time of delivery certain of the said bales had been in contact with drainage from wet sugar carried in the ship on the voyage; but as to whether the said contact with sugar drainage caused a damage, and, if so, as to the number of bales affected, he denies any knowledge or information sufficient to form a belief. In the alternative, he admits that if contact with the said sugar constitutes a damage, the amount thereof, for the purposes of this case, may be taken to be $1,049.31.

5. He denies that all and singular the premises in said libel are true, but admits the jurisdiction of this honorable court.

6. Further answering the said libel, defendant alleges that the said bills of lading, under which it was agreed that said merchandise should be carried, contained amongst others, the following terms and conditions: "With liberty * * * to call at any port or

ports in or out of the customary route" (between Buenos Ayres and New York) "in any order, to receive and discharge * * * cargo * * * and for any other purpose whatever; and with liberty to carry goods, or horses, cattle, sheep, or other live animals, on deck or elsewhere, in the said ship, and to carry goods of all kinds, dangerous or otherwise."

"To be delivered in the like good order and condition at the aforesaid port of New York * * * negligence of master or mariners * * * and all damage arising from the goods
7 by stowage, or contact with, or by sweating, leakage, smell, or evaporation from them * * * however caused or otherwise howsoever * * * or any other peril of the seas, rivers, navigation * * * of whatever nature or kind, and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom be occasioned by the wrongful act, default, negligence, or error in judgment of the owners, masters, officers, mariners, crew, stevedores, engineers and other persons whomsoever in the service of the ship, whether employed on the said steamer or otherwise, and whether before or after, or during the voyage, or for whose acts the ship-owner would otherwise be liable, or by unseaworthiness of the ship at the beginning, or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness * * * excepted." "Weight and condition of contents unknown."

"This contract shall be governed by the law of the flag of the ship carrying the goods."

The *Portuguese Prince* is a British vessel, and at all the times in question was under the British flag; and defendant avers that each and all of the foregoing exceptions are valid under English law. He further avers, in the alternative, that each and all of the said exemptions are valid by the laws of the Argentine Republic, the place where the said contract was made.

7. Under the said liberty to trade on the voyage, the *Portuguese Prince* carried cargo stowed in the No. 3 and No. 4 holds for delivery at intermediate ports, and at one such intermediate port, before the said goods stowed in the after part of the ship were discharged, a quantity of wet sugar in bags was taken aboard, stowed in the lower No. 1 or No. 2 hold, and the balance thereof, for which there was no room below, was stowed in the after part of the No. 2 'tween-decks, a steel deck properly supplied with scupper pipes. The said
8 sugar was properly stowed and dunnaged, and all reasonable provision was made for the escape of the said drainage into the lower hold. The wool in question was carried in the No. 1 'tween-decks, and was properly stowed and dunnaged, each part of the cargo being separated and protected from the other. At a later port on the voyage, those in charge of the vessel omitted to preserve her proper trim whilst discharging and reloading cargo from and into the after holds, and in consequence thereof, a quantity of drainage from the sugar stowed in the No. 2 'tween-decks, which up to that time, while the vessel was in proper trim, had found its way to the limbers, and had done no damage to the libellant's cargo, flowed

out from amongst the bags forward, and coming in contact with the bales of wool, was drawn up into the bales, causing the ends of the bales which were on the dunnage to be affected by the sugar drainage several inches up the bales. The trim of the vessel was thereupon corrected, so that she was slightly by the stern, as before; and thereafter no further damage to said wool arose from drainage from the said sugar, which passed off as before through the scupper pipes to the bilges.

8. The defendant alleges that the said wool and the said sugar were both properly stowed and dunnaged with reference to each other; and that the said damage arose from the fault of those in charge of the vessel to preserve her proper trim whilst trading within the liberty contained in the bills of lading, and that the risk of such damage was, under the terms and conditions of the bills of lading above quoted, agreed to be borne by the owner of the wool. In the alternative, he alleges that if the different portions of the cargo were improperly stowed with reference to each other, then the said damage is within the exception of stowage and damage arising from the negligence of the officers, servants, or stevedores above set forth.

9. The defendant is ignorant of the charges of fault or neglect
9 intended to be proved or urged at the trial by the libellant, and is, therefore, unable to plead to the said charges specifically; but, upon information and belief, he alleges that the damage to the said bales, if any, caused by the said sugar drainage was a loss within one or more of the above-quoted exceptions contained in the said bills of lading, or within other exceptions contained therein, to which respondent will beg leave to refer at the trial, and that the said alleged loss or damage was, under the terms of the contract of carriage, to be borne by the owner of the cargo and was not to be borne by the ship or by the defendant. He further avers that said contract contained in the said bills of lading is to be expounded and interpreted according to the English law, with reference to which the said contract was made.

10. Further answering said libel in the alternative, defendant alleges that he used all due diligence to make the said vessel seaworthy and have her properly manned, outfitted, and equipped for the voyage from Buenos Ayres and the intermediate ports to New York, and that if any loss or damage to the said wool occurred upon the voyage owing to the default or neglect of his servants, such neglect and default constituted a fault or error in the management or navigation of the vessel within the third section of an act of Congress entitled "An act relating to the navigation of vessels," &c., approved February 13th, 1893, and that, under and by the terms of the said statute, the defendant is absolved from all liability for the said alleged loss.

11. All and singular the premises of this answer are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore defendant prays said libel may be dismissed, with costs, or that the court will make such other or different decree as

the justice of the cause may require; and forasmuch as the matters referred to in the libel and foregoing answer are within the knowledge of the libellant, he further prays that said libellant may
10 be required to make full and true answer to the annexed interrogatories.

CONVERS & KIRLIN,
Proctors for Defendant.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

John C. Seager, being duly sworn, says that he is the agent for the defendant in the port of New York, and that the foregoing answer is true according to his information and belief. He further says that the reason why this answer is not verified by the defendant is that the defendant is absent from the district, and resides more than a hundred miles from the place of trial, to wit, at Newcastle-on-Tyne, England.

JOHN C. SEAGER.

Sworn to before me this 14th day of August, 1895.
[SEAL.] FREDERICK GREEN,
Notary Public, N. Y. Co.

Interrogatories Addressed to the Libellant, which it is Required by One of its Officers to Answer in Writing and under Oath.

First interrogatory. Was your company the owner of the goods at the time of shipment, or did you become owner subsequently and before delivery of the wool in New York? If the latter, please state the date on which you became the owner of the goods.

Second interrogatory. Is it not a fact that you or your agent entered the said merchandise at the custom-house in New York, and in such entry recited that the said cargo was imported under the bills of lading annexed thereto and which are referred to in the libel and answer, and also paid the freight under and pursuant to said bills of lading?

11 Third interrogatory. Give a bill of particulars of any alleged fault or neglect on the part of the agents or servants of the defendant, or of any alleged unseaworthiness of the ship, which you claim caused or contributed to the loss referred to in the libel, and for which you claim the defendant should be held responsible in this cause.

Fourth interrogatory. Is there any other matter or thing which you intend to allege or prove or urge in argument at the trial, as a cause or reason for asking a decree against the defendant in this cause, so far as you now know or believe? If so, state it.

Fifth interrogatory. Is it not a fact that the bills of lading referred to in the libel contained, amongst others, the terms, exceptions and conditions set forth in the sixth paragraph of the answer?

Sixth interrogatory. Is it not a fact that each of the said clauses set forth in the sixth paragraph of the answer would form a valid and binding contract under the English law?

Seventh interrogatory. Is it not a fact that ship-owners are permitted by English law to exempt themselves from liability for the negligence of their servants in the loading, stowage or carriage of cargo?

CONVERS & KIRLIN,
Proctors for Defendant.

(Endorsed:) Answer. Filed Aug. 15, 1895.

12 U. S. District Court, Southern District of New York.

BOTANY WORSTED MILLS
vs.
JAMES KNOTT.

Answer of Libellant to the Interrogatories Annexed to the Answer Herein.

To the first interrogatory it says that it was the owner of the goods at the time of shipment.

To the second interrogatory, it is the fact that its agents entered the merchandise in the custom-house in New York, and in such entry referred to the said cargo as imported under the bill of lading annexed thereto. The bill of lading referred to in the libel and answer is that used in entering said goods. Libellant paid the freight at the rate specified in the bill of lading.

To the third interrogatory, libellant has not alleged any fault or neglect of the agents or servants of the respondent, save the failure to deliver said cargo in the like good order as received, nor has it alleged that said vessel was unseaworthy. It has no knowledge as to the faults or neglect of the agents or servants of the respondent save in not delivering the said cargo in the like good order as received nor of the unseaworthiness of said vessel, save as stated in the answer herein, to wit, a quantity of drainage from the sugar stowed in the between-decks, which flowed from those bags forward and on to the bags of wool, which the said answer states was carried in the No. 1 between-decks, due to the vessel being out of her proper trim, and to the fact which has been communicated to libellant that the bulkhead between the compartments was made of wool, and permitted the drainage to pass through from the No. 3 hold
13 into the No. 2 hold, where the libellant is informed the said wool was stowed, but as to the accuracy of such information it has no knowledge, but it claims that such injury to its cargo was caused by the improper stowage thereof in a place where the drainage of sugar could reach it, and that the said steamship was unseaworthy as to said cargo, in the place where it was stowed.

To the fifth interrogatory, the bills of lading referred to in the libel contained, among other things, the matter set forth in the sixth paragraph of the answer.

To the seventh interrogatory, libellant is informed and believes that some English courts have held that under the laws of England the owners of vessels are permitted in England to make contracts

which exempt them from liability for the negligence of their servants in loading, stowage and carriage of goods.

GEO. A. BLACK,
Lib'l's Proctor.

DISTRICT OF NEW JERSEY, *ss:*

Oscar Dresser, being duly sworn, says that he is the treasurer of the Botany worsted mills, a corporation, and that the foregoing answers are true of his own knowledge except as to the matters therein stated upon information and belief, and that as to those matters he believes them to be true.

(S'g'd) OSCAR DRESSER.

Sworn to before me this 21st day of October, 1895.

CHARLES RUOT,
[SEAL.] *Notary Public of N. J.*

(Endorsed:) Answer to interrogatories. Filed Nov. 1, 1895.

14 To the Honorable Addison Brown, district judge of the United States for the southern district of New York:

The libel and complaint of Henry P. Winter and Charles F. Smillie, composing the firm of Winter & Smillie, merchants in the city of New York, libellants, against James Knott of Newcastle-upon-Tyne, England, owner of the steamship *Portuguese Prince*, respondent, in a cause of contract, civil and maritime, alleges and articulately propounds as follows:

First. At all the times hereinafter mentioned, your libellants were and still are merchants in the city of New York, doing business under the firm name and style of Winter & Smillie.

Second. The respondent, James Knott, is, as your libellants are informed and verily believe, a resident of Newcastle-upon-Tyne, England, and at all the times hereinafter mentioned was and now is the owner of the British steamship *Portuguese Prince.*

Third. At all the times hereinafter mentioned, the said steamship *Portuguese Prince* was engaged in business as a common carrier.

Fourth. On or about the 24th day of December, 1894, there were shipped on board of said steamship *Portuguese Prince*, then lying at the port of Buenos Ayres, in the Argentine Republic, and bound for the port of New York, by Henry Caulliez of Buenos Ayres, 39 bales of wool, of which 10 were marked C. H. E. and numbered 101 to 110, inclusive, 10 were marked R. I. A. and numbered 210 to 219, inclusive, 10 were marked R. I. S. and numbered 320 to 329, inclusive, 5 were marked H. E. R. and numbered 401 to 405, inclusive, 2 were marked E. A. I. and numbered 601 to 602, inclusive, and 2 were marked Z. I. G. and numbered 603 and 604. All of the said bales were the property of your libellants and were to be
15 conveyed and transported to the port of New York and there delivered to your libellant. The masters or agents of the said steamship *Portuguese Prince* thereupon signed bill of lading for said 39 bales of wool in and by which they acknowledged the re-

ceipt thereof in good order and condition and undertook and agreed to deliver the same in like good order and condition at the port of New York to order, for freight stipulated to be paid therefor. Thereafter the said bill of lading was duly endorsed by the shipper and delivered to your libellants.

Fifth. Thereafter the said steamship *Portuguese Prince* sailed from the port of Buenos Ayres with said wool on board and arrived at the port of New York on or about the 30th day of March, 1895, and there delivered the said 39 bales of wool, but not in the like good order and condition as received, 37 of said bales of wool, numbered 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 401, 402, 403, 404, 405, 601, and 602, being damaged, and that the damage to said 37 bales of wool amounts to the sum of $345.58.

Sixth. All and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore your libellants pray that a process in due form of law according to the course and practice of this honorable court in cases of admiralty and maritime jurisdiction may issue against the respondent James Knott, and in case he cannot be found, then that his goods, chattels and credits be attached to the amount sued for, and that he may be required to appear and answer all and singular the matters aforesaid, and that this honorable court will be pleased to decree payment of the amount due to your libellants, together with interest and costs, and that your libellants may have
16 such other and further relief in the premises as in law and justice they may be entitled to receive.

BUTLER, STILLMAN & HUBBARD,
Proctors for Libellants 54 *Wall Street, New York City.*

CITY AND COUNTY OF NEW YORK, }
Southern District of New York, } *ss:*

Henry P. Winter, being duly sworn, deposes and says that he is one of the libellants above named; that he has read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

HENRY P. WINTER.

Sworn to before me this 24th day of September, 1895.

[L. S.] GEORGE CROMWELL,
Notary Public, Richmond County.

Certificate filed in N. Y. Co.

(Endorsed:) Libel. Filed Sept. 24, 1895.

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17 To the Honorable Addison Brown, United States district judge for the southern district of New York:

The answer of James Knott, owner of the steamship *Portuguese Prince*, respondent, to the libel and complaint of Henry P. Winter and Charles F. Smillie, composing the firm of Winter & Smillie, merchants of the city of New York, in a cause of contract, civil and maritime, alleges as follows:

First. He admits the matters alleged in the first article of the libel.

Second. He admits the matters alleged in the second article of the libel.

Third. He admits the matters alleged in the third article of the libel.

Fourth. Answering the fourth article of the libel, the respondent alleges that he has no knowledge or information sufficient to form a belief regarding the shipment of wool mentioned in the libel, except the recitals contained in the bill of lading therefor, which acknowledges that on or about the 24th day of December, 1894, there were shipped on board the steamship *Portuguese Prince*, then lying at the port of Buenos Ayres in the Argentine Republic, and bound to the port of New York, by Henry Caulliez, 39 bales of wool, marked as alleged in the libel, to be carried and transported to the port of New York; and that thereupon the agents of said steamship at Buenos Ayres signed a bill of lading for said 39 bales of wool, in and by which they acknowledged the receipt thereof, in apparent good order and condition, and undertook and agreed to deliver the same at the aforesaid port of New York in the like good order and condition, unto order, for a stipulated freight, and upon the terms, conditions, exceptions and limitations contained in the said contract of carriage.

18 He denies any knowledge or information sufficient to form a belief as to whether the said bales were the property of the libellants at the time of shipment, but admits that thereafter said bill of lading was duly endorsed by the shippers and delivered to the libellants, and that at the time of delivery thereof said wool was the property of the libellants.

Fifth. He admits that thereafter the said steamship *Portuguese Prince* sailed from the port of Buenos Ayres with said wool on board, and arrived at the said port of New York on or about the 30th day of March, 1895, and there delivered the said 39 bales of wool, pursuant to the terms, conditions and provisions of the said bill of lading unto the libellants; and that at the time of delivery certain of the said bales had been in contact with drainage from wet sugar carried in the ship on the voyage; but as to whether said contact with sugar drainage caused the damage, and if so, as to the number of bales affected, he denies any knowledge or information sufficient to form a belief.

If any of said bales of wool was damaged, he denies any knowledge or information sufficient to form a belief as to the amount of damage thereto.

Sixth. He denies that all and singular the premises of the libel are true, but he admits the jurisdiction of this honorable court.

Seventh. Further answering the said libel, and for a further and separate defense, the respondent alleges:

(1.) That the said bill of lading, under which it was agreed that said merchandise should be carried, contained, amongst others, the following terms and conditions:

"With liberty * * * to call at any port or ports in or out of the customary route (between Buenos Ayres and New York) in any order, to receive and discharge * * * cargo * * * and for any other purpose whatever; and with liberty to carry goods, or horses, cattle, sheep, or other live animals, on deck or elsewhere, in the said ship, and to carry goods of all kinds, dangerous or otherwise. To be delivered in the like good order and condition at the aforesaid port of New York * * * negligence of master or mariners * * * and all damage arising from the goods by stowage, or contact with, or by sweating, leakage, smell or evaporation from them * * * however caused, or otherwise howsoever * * * or any other peril of the seas, rivers, navigation * * * of whatever nature or kind, and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom be occasioned by the wrongful act, default, negligence, or error in judgment, of the owners, masters, officers, mariners, crew, stevedores, engineers, and other persons whomsoever in the service of the ship, whether employed on the said steamer or otherwise, and whether before, or after, or during the voyage, or for whose acts the ship-owner would otherwise be liable, or by unseaworthiness of the ship at the beginning, or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness * * * excepted. Weight and condition of contents unknown. This contract shall be governed by the law of the flag of the ship carrying the goods."

(2.) Under the said liberty to trade on the voyage the *Portuguese Prince* carried cargo stowed in the No. 3 and 4 holds, for delivery at intermediate ports, and at one such intermediate port, before the said goods, stowed in the after part of the ship, were discharged, a quantity of wet sugar in bags was taken on board, part of which was stowed in the lower No. 2 hold and the balance thereof, for which there was no room below, was stowed in the after part of the No. 2 between-decks, a steel deck properly supplied with scupper pipes.

The said sugar was properly stowed and dunnaged, and all reasonable provision was made for the escape of the drainage therefrom into the lower hold. The wool in question was carried in the No. 1 between-decks, or the forward part of the No. 2 between-decks, and was properly stowed and dunnaged, each part of the cargo being separated and protected from the other.

At the time of leaving Buenos Ayres and the port where this wet sugar was loaded, the vessel was properly trimmed, being by the stern, and all drainage from the sugar went aft and down to the lower hold by the scupper pipes without coming in contact with

the wool. At a later port on the voyage, those in charge of the vessel omitted to preserve her proper trim, whilst discharging and reloading cargo from and into the after holds, and in consequence thereof, drainage from the sugar stowed in the after part of the No. 2 between-decks, which, up to that time, while the vessel was in proper trim, had found its way to the linbers and done no damage to the wool, flowed out from amongst the bags forward, and coming in contact with the bales of wool, was drawn up into the bales, causing the ends of the bales which were on the dunnage to be affected by the sugar drainage to the height of several inches. The trim of the vessel was thereupon corrected, so that she was by the stern as before, and thereafter no further damage to said wool arose from drainage from the said sugar, which passed off as before through the scupper pipes to the bilges.

(3.) In the alternative, the respondent alleges that if the different parts of the cargo were improperly stowed, with reference to each other, then the said damage is within the exception of stowage and damage arising from the negligence of the officers, servants or stevedores, above set forth.

21 (4.) The respondent is ignorant of the charges of fault or of neglect intended to be proved or urged at the trial by the libellants, and is, therefore, unable to plead to the said charges specifically; but, upon information and belief, he alleges that the damage to said bales, if any, caused by the said sugar drainage, was a loss within one or more of the above-quoted exceptions contained in the said bill of lading, or within other exceptions contained therein, to which respondent will beg leave to refer at the trial; and that the said alleged loss or damage was, under the terms of the contract of carriage, to be borne by the owner of the cargo, and was not to be borne by the ship, or by the responoent.

He further avers that the said contract contained in the said bill of lading is to be expounded and interpreted according to the English law, with reference to which the said contract was made, and that by said English law exemptions from and liability for loss or damage caused by negligence are valid.

(5.) Respondent alleges that he used all due diligence to make the said vessel seaworthy, and have her properly manned, outfitted and equipped for the voyage from Buenos Ayres and the intermediate ports to New York; and that if any loss or damage to the said wool occurred upon the voyage, owing to the default or neglect of his servants, such neglect and default constituted a fault or error in the management or navigation of the vessel, within the third section of an act of Congress, entitled "An act relating to the navigation of vessels," &c., approved February 13, 1893, and that under and by the terms of the said statute, the respondent is absolved from all liability for the said alleged loss.

Eighth. All and singular the premises of this answer are true, and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore, the respondent prays that said libel may be dismissed with costs, or that the court will make such other or different

decree as the justice of the cause may require; and forasmuch
22 as the matters referred to in the libel and foregoing answer are within the knowledge of the libellants, he further prays that said libellants may be required to make full and true answers to the annexed interrogatories.

CONVERS & KIRLIN,
Proctors for Respondent.

SOUTHERN DISTRICT OF NEW YORK, } ss :
City and County of New York, }

John C. Seager, being duly sworn, says that he is the agent for the respondent in the port of New York, and that the foregoing answer is true according to his information and belief. He further says that the reason this answer is not verified by the respondent is that he is absent from the district, and resides more than a hundred miles from the place of trial, to wit: Newcastle-on-Tyne, England.

JOHN C. SEAGER.

Sworn to before me this 28th day of May, 1896.

FREDERICK GREEN,
[SEAL.] *Notary Public, New York County.*

23 *Interrogatories Addressed to the Libellants, Which One of Them, Acquainted with the Facts, is Required to Answer in Writing and under Oath.*

First interrogatory (*a*). Were you the owners of the goods at the time of shipment, or did you become owners subsequently and before delivery of the wool in New York? (*b.*) If the latter, please state the date on which you became the owners of the goods.

Second interrogatory. Is it not a fact that you or your agents entered the said merchandise at the custom-house at New York, and in such entry recited that the said cargo was imported under the bill of lading annexed thereto, and which is referred to in the libel and answer, and also paid the freight under and pursuant to the said bill of lading?

Third interrogatory. Give a bill of particulars of any alleged fault or neglect on the part of the agents or servants of the respondent, or of any alleged unseaworthiness of the ship, which you claim caused or contributed to the loss referred to in the libel, and for which you claim the respondent should be held responsible in this cause.

Fourth interrogatory. Is it not a fact that the bill of lading referred to in the libel contained, amongst others, the terms, exceptions, and conditions set forth in the first paragraph of the further and separate defense of the answer?

Fifth interrogatory. Is it not a fact that ship-owners are permitted by English law to exempt themselves from liability for the negligence of their servants in the loading, stowage or carriage of cargo?

CONVERS & KIRLIN,
Proctors for Respondent.

(Endorsed:) Answer & interrogatories. Filed May 29, 1896.

24 United States District Court, Southern District of New York.

THE BOTANY WORSTED MILLS
vs.
JAMES KNOTT.

WINTER
vs.
THE SAME.

Before Hon. Addison Brown, Judge.

NEW YORK, *June* 5, 1896.

Appearances.

George A. Black, Esq., for The Worsted Mills.
Butler, Stillman & Hubbard, Esquires (Mr. Mynderse), for libellant Winter.
Convers & Kirlin, Esquires (Mr. Kirlin), for the respondent.

The claims of the libels and answers are stated.

It is admitted by respondent that the vessel was a common carrier.

Mr. KIRLIN: We admit the amount of damage in the Worsted Mills case. In the Winter case the libel was filed later, and I have not had time to verify it, but I presume it is correct.

Also, the libellant alleged in the fourth article that the property at the time of the shipment belonged to the libellant. That was denied in the answer but is now admitted.

Mr. KIRLIN: I offer in evidence the answers to the interrogatories in the Worsted Mills case. In the other case the interrogatories are not answered.

Mr. MYNDERSE: We will take the answers of Mr. Black to the interrogatories as our answers.

25 Mr. KIRLIN: I consent to that.

Mr. KIRLIN: I offer in evidence a stipulation as to certain facts.

It is marked Respondent's Exhibit A.

Mr. KIRLIN: I also offer in evidence the bills of lading for both consignments.

The two bills of lading in the Worsted Mills case are marked Respondent's Exhibit B.

The bill of lading in the Winter case is marked Respondent's Exhibit C.

Mr. KIRLIN: I also offer in evidence pages 11 and 12 of the official log, giving dates of sailing, arrival and departure at the various ports and the draft at each port.

(It is consented that a copy be substituted in place of the original.)

The pages of the official log are marked Respondent's Exhibit D.

Mr. KIRLIN: I also offer in evidence the entries in the deck log, beginning at Pernambuco on Tuesday, the 19th of February, 1895, and including the entries up to Wednesday, March 20.

The entries are marked Respondent's Exhibit E.

Mr. BLACK: It appears by the log that after leaving Buenos Ayres the vessel visited Santos, Rio Janeiro, Bahia and Maceo and then went to Pernambuco. That at each of these ports she took in and discharged cargo, and that when she left Santos she was drawing 20 ft. forward and 16 ft. aft, or was 4 ft. by the head. That when she arrived at Rio she was drawing 19 ft. 8 forward and 16 ft. aft, or was 3 ft. 8 by the head.

Mr. KIRLIN: I call attention to the entries of draft at Pernambuco, Para, Port of Spain and Grenada, which are as follows:

It appears that on arrival at Pernambuco, February 19, 1895, at 2.30 p. m., the ship's draft was 14 ft. 6 forward, 21 ft. 3 aft.
26 That on sailing from Pernambuco, February 24, at 4 p. m., her draft was 21 ft. 6 forward, 22 ft. 4 aft.

That on arrival at Para, March 3, 1895, 9 a. m., her draft was 21 ft. 3 forward and 21 ft. 9 aft. That on sailing from Para, March 10, at 8 p. m., her draft was 19 ft. 6 forward and 17 ft. 6 aft, or 2 ft. by the head.

That on arriving at Port of Spain, (Trinidad,) on March 16, at 8 p. m., her draft was 19 ft. 3 forward and 17 ft. 6 aft. That on leaving Port of Spain, March 18, at 11 p. m., her draft was 18 ft. forward and 19 ft. aft.

That on arrival at Grenada, March 19, at 2.30 p. m., her draft forward was 18 ft. and aft 18 ft. 11. That on departing from Grenada, March 20, at 1 a. m., her draft was 17 ft. 6 forward and 21 ft. 6 aft. That she remained by the stern the rest of the voyage to New York, where she arrived on the 31st of March, at 11.15 p. m., her draft forward being 17 ft. 3 and aft 20 ft. 5.

HERBERT B. SAUNDERS, being duly sworn and examined as a witness for the respondent, testifies:

By Mr. KIRLIN:

Q. What is your business?
A. Marine superintendent.
Q. Of the Prince Line of New York?
A. Of the Prince Line of New York.
Q. The *Portuguese Prince* belongs to the Prince line?
A. The *Portuguese Prince* belongs to the Prince line.
Q. Where does that line go?
A. Trades between New York and Brazil, and the River Plata.
Q. Was the *Portuguese Prince* making the voyage in that line when the damage to the wool took place?
A. Yes, sir.
Q. Is that paper which you have in your hand a plan of the ship?
A. A plan of the *Portuguese Prince.*
Q. You know the ship?
A. I know the ship.
27 Q. Have you been aboard of her at different times?
A. Yes, sir.

The plan is offered in evidence. It is marked Respondent's Exhibit F.

Q. What are your functions?
A. Marine superintendent.
Q. What do you do when vessels come in?
A. General superintending of all the work connected with the ship—loading and discharging.
Q. Do you go to the dock?
A. I go to the dock.
Q. See the cargo in and out?
A. I do.
Q. Did you attend upon the *Portuguese Prince* upon her arrival from this voyage?
A. I did.
Q. Did you see the damaged wool?
A. I did.
Q. Did you see it before it all came out?
A. I saw it before it was touched.
Q. Did you see the damage?
A. I saw the damage.
Q. Will you show on the plan of the ship where the wool was stowed?
A. The wool was stowed in the fore part of the fore between-decks, in the fore part of the temporary bulkhead, and the sugar was stowed on the after part, as marked on the plan.
Q. Have you drawn a line there indicating where the wooden bulkhead was?
A. I have; it was on the after part of the foremast.
Q. How far was the wool from the bulkhead?
A. From the wooden bulkhead? About ten feet from the fore part of the wooden bulkhead.
Q. Where was the sugar?
A. About 25 to 30 feet on the after part of the wooden bulkhead.
Q. Does that mean aft from the wooden bulkhead?
A. Aft from the wooden bulkhead.
Q. Extending back how far?
A. Right to the iron bulkhead next to the bunker.
Q. How much sugar was there in there?
A. About 200 tons.
Q. What kind of sugar was it?
A. Green sugar.
Q. Describe how the sugar was stowed?
A. The sugar was stowed in tiers properly dunnaged.
28 Q. What kind of dunnage was under it?
A. Three-inch deals and hatches.
Q. Under the whole of it?
A. Under the whole of it.
Q. What was there, if anything, between the foremost part of the sugar and the wooden bulkhead?
A. Nothing at all.

Q. No cargo stowed there?
A. No cargo stowed there at all; empty space.
Q. Describe the stowage of the wool?
A. The wool was stowed on the end, properly dunnaged.
Q. In what kind of packages?
A. In bales.
Q. What size bales?
A. Ordinary size; about 8 feet; 4 feet square.
Q. Was there any dunnage under that?
A. Properly dunnaged.
Q. What kind?
A. Deals.
Q. How high?
A. About 2½ or three inches.
Q. Are you a master mariner?
A. I am.
Q. Have you followed the sea for some years?
A. I have.
Q. How long in steamers?
A. Eleven years.

By the COURT:

Q. How much wool did you say there was; was that compartment full forward of the bulkhead?
A. No, the compartment was not quite full.
Q. How far away from the bulkhead did it begin?
A. About 10 feet.
Q. Why is all that space left vacant on each side of the bulkhead?
A. There was no cargo to put in there.
Q. Why wasn't it distributed?
A. Because this bulkhead is only a temporary bulkhead with doors in.
Q. As I understand from what you have said there was a space of 25 or 30 feet aft of the bulkhead with nothing in it?
A. Yes.
Q. And forward of the bulkhead within 10 feet, with nothing in it?
A. Yes, sir. It may have been some of the cargo at an intermediate port, such as Saint Lucia or Trinidad; may have
29 been taken out of the after part.

By Mr. KIRLIN:

Q. State from your experience and judgment whether that dunnage that was under the wool and sugar was the ordinary and usual dunnage.
A. It was above the usual dunnage.
Q. At the time you discovered the damage was there any sugar drainage on the between-decks?
A. There was signs of sugar drainage, but actually no drainage there.

Q. Was there any accumulation?
A. No accumulation at all.
Q. Was there any drainage to touch the wool at the time you saw it?
A. No.
Q. How was the ship trimmed then, by the head or stern?
A. Little by the stern.

By the COURT:

Q. There were indications there had been previous drainage in the forward compartment where the wool was?
A. Yes.
Q. All the way from the bulkhead to the wool?
A. All the way from the sugar to the wool.
Q. And also on the wool did you see it?
A. I saw it on the wool.
Q. But there was nothing there then, you mean what you saw was all dried sugar?
A. All dried sugar.

By Mr. KIRLIN:

Q. Was there any drainage from the sugar at that time?
A. It was draining, yes.
Q. Where was the drainage going?
A. In the after part of the scuppers.
Q. Where are the scuppers?
A. In the after part of the between-decks.
Q. How large are they?
A. 2½ inches.
Q. Where with reference to the engine-room bulkhead were the scuppers?
A. The bunker bulkhead? Close to it.
Q. How near the side of the ship?
A. Just below the stringer.
Q. Practically in the corners, then?
A. Practically in the corners.
Q. How many?
A. One on either side.

By the COURT:

Q. How about the size of those scuppers?
A. They were large size.

By Mr. KIRLIN:

Q. What ship did this used to be?
A. If I remember rightly she was called *St. Dunstan*, either *St. Dunstan* or *St. Romans*, engaged from New York to Liverpool in the cattle trade.
Q. Were there any other scuppers in the between-decks besides those two?
A. Yes, sir.

Q. Where were the next ones forward of it?
A. Abreast of the foremast, as shown on the plan.
Q. Which side of the wooden bulkhead would that be?
A. Just about in the line of the bulkhead.
Q. Where were the next ones?
A. The next ones? There were only two, that is two on either side.

By the COURT:

Q. I don't quite understand what scuppers there were forward of the forward bulkhead.
A. Abreast of the foremast.

By Mr. KIRLIN:

Q. Little forward of the bulkhead?
A. Just slightly, little forward.

By the COURT:

Q. One on either side?
A. One on either side.

By Mr. KIRLIN:

Q. The same kind of scuppers as the other?
A. The same kind.

By the COURT:

Q. Then that would take off drainage from the forward bulkhead?
A. It would take off drainage.
31 Q. This was in the between-decks as I understand?
A. In the between-decks.

By Mr. KIRLIN:

Q. Was there any damaged wool except in the between-decks?
A. No, sir.
Q. What kind of deck is this?
A. An iron deck.

By the COURT:

Q. Was there any leakage through that deck?
A. No, sir; there were three bales damaged with salt water. Not through the deck.
Q. Below under the deck was there any wool?
A. In the fore lower hold there was wool, but no damaged wool.
Q. Any other cargo damaged by sugar drainage in the lower hold?
A. No, sir.

By Mr. KIRLIN:

Q. You said the sugar was draining in the between-decks at the time it was being discharged, was that drainage escaping?
A. Yes, sir.

Q. Where did it go to,?
A. The bilges.
Q. Went down in the limbers?
A. In the limbers.
Q. Was there any accumulation on the deck at all?
A. No, sir.
Q. When the ship is on an even keel how will liquids drain in the forward between-decks?
A. It will drain aft.
Q. How will they drain when——

By the COURT:

Q. Can you tell me how much the pitch is; do you know what the sheer is; that would be from the forward bulkhead or all along between the forward bulkhead and the next one—is there one next to it?
A. There is a water-tight bulkhead or collision bulkhead.
Q. This was not a collision bulkhead?
A. No, sir.
Q. How far aft of that wooden bulkhead was the first bulkhead?
A. The bunker bulkhead.
Q. How far aft was it aft of the forward one?
A. About 80 feet.

32 The WITNESS: By forward bulkhead I mean the division bulkhead in the forward compartment, all of which is aft of the forward bulkhead, which is the collision bulkhead.

By Mr. KIRLIN:

Q. How much will the ship be by the head before fluids will drain forward; can you tell that approximately?
A. This particular ship, if she was six inches by the head it would naturally drain forward because the ship plowing through the water would naturally tend to sink, that is she would dip; if she were perfectly still there would be no drainage six inches by the head, she would still remain stationary.
Q. How with a foot by the head?
A. It would drain forward.
Q. Is the drainage of wet Pernambuco sugar reasonably to be expected by a shipmaster?
A. Yes, sir.
Q. With the knowledge that it would probably drain, do you say the master ought to have taken any precautions with regard to the wool when he put the ship two feet by the head at Para?

Counsel for the Worsted Mills objects to the question as a question of law. Objection sustained.

Q. Was there anything that might have been done by the master of the ship in Para to counteract the change of trim which resulted there from the discharge of the cargo aft?
A. When the master of the ship found that he had no cargo——

Q. Answer yes or no?
A. Yes.
Q. What could he have done?

Counsel for libellant Winter objects, on the ground that it doesn't appear that the master did this at all.

A. When the master of the ship found there was no cargo to take in at Para, it was his duty, knowing the value of the wool, either to protect it or move it to the after part of the vessel.
33 Q. What do you mean by protecting it?
A. He might have taken the sugar and discharged the sugar, put it into another compartment, or transferred the wool, whichever was most convenient.
Q. Could one or the other of those things have been done?
A. They could.
Q. What is your judgment as a master as to the expediency of adopting one or the other of those courses in Para?
A. It should have been done.
Q. Which in your judgment?
A. It would have been easier to shift the wool than to shift the sugar.
Q. How much would it have cost to shift the wool aft?
A. It would cost less than twenty pounds.
Q. Have you been in this port yourself?
A. I have never been in Para, but I know the cost of labor.
Q. Have you traded in South America?
A. I have traded at South America.

Cross-examined by counsel for the Worsted Mills.

By Mr. BLACK:

Q. You say that there were three-inch deals under this sugar and on top of the hatches as dunnage, don't you?
A. No, sir; three-inch deals and hatches, that is, the between-decks hatches were used as well as three-inch deals for dunnage.
Q. You don't mean to say the hatches were on top of the deals?
A. No, sir.
Q. The total amount of space between the deck and bags of sugar you estimated as 3 inches in the greatest place?
A. Yes, sir.
Q. And in the least place?
A. 2½.
Q. What was there under the wool?
A. The same things.
Q. How did those deals run, athwartship or fore and aft?
A. Athwartship.
Q. Under both wool and sugar?
A. Under both wool and sugar.
Q. Have you ever carried this wet sugar yourself?
A. I have.

Q. When it is taken on board it is quite moist, isn't it?

A. It is.

34 Q. And it drains most when it comes fresh on board the ship and is first stowed?

A. Yes, sir.

Q. And gradually decreases as the voyage continues, so that at the early portion of the voyage there would be quite a large accumulation of drainage?

A. It would.

Q. Which you have to expect and do expect?

A. We do.

Q. Was the evidence of the drainage which you saw in the forward compartment quite extensive, did it spread over a large surface?

A. Right across the ship.

Q. How far forward of the wooden bulkhead?

A. If I remember rightly to the third tier.

By the COURT:

Q. To the third tier of wool?

A. To the third tier of wool.

By Mr. BLACK:

Q. How large were the bales of wool?

A. About four feet square and seven or eight feet high.

Q. Were they lying on the larger side?

A. Laying on their end.

Q. So the space you speak of as three tiers would be how much in feet?

A. About 12 feet. I do not mean across the ship, I mean the greatest length.

By the COURT:

Q. How high above the bottom of the wool was the sign of damage?

A. About from 10 to 12 inches, the greatest part.

By Mr. BLACK:

Q. Did that extend completely across the first tier of wool?

A. Across the first tier of wool, yes, sir.

Q. And the same way across the second?

A. No.

Q. It wasn't so high on the second tier?

A. It wasn't so high on the second tier; it didn't extend to all the bales on the second tier.

By the COURT:

35 Q. What is meant by the "second tier," what do you mean by "tier"?

A. Anything is a tier, using a stevedore's phrase, that follows in succession. Pile barrels one on top of the other it is first, second

and third. If you were stowing bales of wool or hogsheads of tobacco it would take the complete space from deck to deck and run fore and aft, you call them tiers just the same.

By Mr. KIRLIN:

Q. Call the rows crossways tiers?
A. Yes, sir.
Q. Is that what you mean by tiers?
A. That is what I meant.
Q. Was there only one bale up and down?
A. Only one bale up and down.
Q. One bale high up and down?
Q. One bale high up and down.
Q. The bale put on end?
A. The bale put on end.
Q. So the long way of the bale was perpendicular?
A. Yes.
Q. And what you call "tier" is a line of those bales running athwartships, or running fore and aft?
A. Running any way as long as it is a continuous line.
Q. You have spoken of tiers?
A. Yes, sir.
Q. Is that a line of bales running athwartships or running fore and aft?
A. It can be both ways as long as it is a continuous line.
Q. Which are you speaking of?
A. Athwartships.
Q. By the "second tier," which showed less sign of drainage, you mean it is the line athwartships that was farther forward?
A. Yes, sir.
Q. The second cross-line forward from the wooden bulkhead?

By Mr. BLACK:

Q. How high up did the sugar drainage show on the second row of bales running forward?
A. Some bales it only showed on the corner, others 7, 8 and 9 inches. The bales in the wing were more damaged than those in the center of the ship.

The COURT: I shall call that the front row.

36 Q. And the third row forward, how was that?
A. Very little damaged.
Q. Was that the last of the rows that showed damage?
A. I think, if I remember rightly, the fourth row forward, the two wing bales were a little damaged.
Q. On which side of the wings; when you speak of the wings do you mean both sides?
A. I mean both sides.
Q. How close together did these pieces of deals lie on the deck forming this dunnage?
A. About 7 to 9 inches apart.

Q. How wide were they?
Q. 11 inches.
Q. And they were really what we call plank 3 inches or 2½ inches thick and from 9 to 11 inches wide?
A. 3 by 11 regulation commercial standard wood.
Q. And the space between them was what?
A. 7 to 9 inches.
Q. Did the space between and the deals themselves show the signs of the sugar drainage?
A. Yes, sir.
Q. How far forward on the deals did you find the signs of sugar drainage?
A. That same distance the wool was damaged.
Q. Did the deals hold clean over to the wings or stop short of the wings?
A. They left a channel.

By the COURT:

Q. Was there any sheer on the floor of that part of the vessel running forward?
A. Yes, sir.
Q. Do you know how much it was?
A. I do not.
Q. Can you give any approximate idea?
A. I could not, sir.
Q. Do you know whether the rate of sheer increased at all towards the forward part of the place where the wool was stowed?
A. It did.
Q. You think the rate of sheer increased?
A. It did.
Q. You understand me, don't you?
A. I understand what you mean.
Q. Before you get to the collision bulkhead, I intended to ask whether the rate of the curvature was increased?
A. Yes, sir.

37 By Mr. BLACK:

Q. How wide was the *Portuguese Prince* at the first row of bales?
A. I should judge about 28 feet.
Q. That would only make seven bales in the row, wouldn't it, of 4 feet square?
A. That is all.
Q. I mean the row nearest the wooden bulkhead?
A. I couldn't say correctly. It wouldn't decrease much.
Q. There couldn't have been more than seven to eight bales of wool in the first row aft?
A. If the beam was 35 feet; why, yes.

By the COURT:

Q. If the beam was 35 feet what would the first row of bales be?
A. Is that over all? Allow me to look at the dimensions of the

ship. (Referring to the plan.) The inside of that ship would be 33 feet 6.

By Mr. BLACK:

Q. Then you couldn't get more than eight bales in a row, could you?

A. We could get eight bales—nine bales. We would squeeze them in, push them in.

By the COURT:

Q. If they are four feet square you couldn't get in nine?

A. They would be so compressed with jacks you could get them in.

Q. Do you mean they could be compressed a foot, a bale could?

A. Yes, sir; we mat them together at the wings and screw a bale in at the center.

By Mr. BLACK:

Q. How many rows of bales were there running from the extreme after row to the extreme forward row?

A. I didn't count them.

Q. Do you know the length of the No. 1 between-decks where this wool was stowed?

A. I should judge about 43 feet.

Q. That is between the wooden bulkhead and the collision bulkhead?

A. Yes, sir.

38 Cross-examined by counsel for libellant Winter.

By Mr. MYNDERSE:

Q. What is your position?

A. Marine superintendent.

Q. For the Prince line?

A. For the Prince line.

Q. This was one of the vessels of the Prince line?

A. Yes, sir.

Q. You are resident agent in New York?

A. Not agent, superintendent.

Q. Resident superintendent in New York?

A. Yes, sir.

Q. Who are agents in New York?

A. John C. Seager.

Q. Where does the Prince line run?

A. The particular line from New York runs to the Brazils and the River Plata.

Q. In the trade indicated in the official log of the *Portuguese Prince?*

A. The *Portuguese Prince*, yes, sir.

Q. Have you ever been on the line?

A. On the Brazilian trade, not on the River Plata trade.

Q. Since you have been on it in connection with the Prince line, have you?
A. Yes, sir.
Q. They receive and deliver cargo at each of these ports?
A. They do, sir; or they did.
Q. And is the line known down there by the name of the Prince line?
A. It is.
Q. Advertised as such?
A. Advertised as such.
Q. Resident agents in each port?
A. In each port.
Q. They engage freight and attend to the vessel's business generally?
A. They do.
Q. Engage cargo, I mean?
A. They do engage cargo.
Q. And attend to the deliveries and collection of freight and generally acting as agents of the vessels in each port?
A. They do.
Q. The master is the navigator of the vessel?
A. He is the owner's representative.
Q. He is the navigator of the vessel?
A. He is the navigator.
39 Q. He is not a business representative?
A. He does.
Q. Who makes the freight engagements?
A. The agent does.
Q. Not the master?
A. He generally confers with the master.
Q. When was this line established?
A. I don't know the exact date.
Q. About when?
A. That line to the Brazils was established about four years ago.
Q. And maintained still?
A. It is.
Q. And how about the River Plata trade?
A. About the same time.
Q. That is still maintained?
A. That is still maintained.
Q. These vessels are all carriers of general cargo?
A. They are. They are A1 ones.
Q. They don't run under charter?
A. No.
Q. What are the classes of cargo that they carry?
A. They carry every description of cargo.
Q. From here to South America and from South America back?
A. Back.
Q. When you say "every decription of cargo" what do you mean?
A. General merchandise.

Q. Such as the products——
A. Such as the products of the different countries.
Q. They carry sugar, wet sugar?
A. They do.
Q. This bulkhead which existed between the wool and the sugar was not a part of the original construction of the vessel?
A. It was not, it was a temporary bulkhead.
Q. Do you know when it was put in?
A. It is moved about to suit the convenienc- of the cargo. It would be hard to say when it was put in.
Q. Do you know when it was put in the particular position it occupied on this trip?
A. I do not.

By the COURT:

Q. Do you say it was put on on this trip?
A. No, sir.
Q. You don't know?
A. I don't know.
Q. You don't know whether it was put on on this trip or before this trip?
40 A. No; they always carry one or two of these bulkheads for the convenience of the ports, and they are just put up at any time it is required.

By Mr. BLACK:

Q. What is the name of the captain of this vessel?
A. Anderson.
Q. How long had he commanded her in December, 1894?
A. He commanded the *Portuguese Prince* from the time we bought her. I don't exactly remember how long, whether it was two or three years.
Q. Before this time?
A. About two years. He has been in her about three years now altogether.

Redirect by counsel for respondents.

By Mr. KIRLIN:

Q. Is he still in command of her?
A. He is still in command of her.
Q. He had been in her about a year and a half at the time of this matter?
A. About a year and a half or two years.
Q. Did she have a full set of officers and men?
A. She had a full set of officers.
Q. In what condition was she generally as to seaworthiness?
A. First class.
Q. Who, as between the master and agent in Brazil, is reponsible for the stowage of cargo and trim of the vessel?

Counsel for the Worsted Mills and libelant Winter object.

The COURT: The word "responsible" I strike out. You can ask whose duty it was.

Q. Whose duty was it, as between the agent and the master in Brazil, to attend to the placing of the cargo in the ship, its stowage and the trim of the vessel itself?

A. The master's duty.

Q. Is there any rule in the Prince line as to the liability of the master for damage of the cargo?

A. Yes, they are especially warned.

Counsel for the Worsted Mills objects to the answer.

41 Q. In case of actual damage the ship being held responsible for it, is the master charged with the damage?

A. The master is severely censured.

Q. Is the master obliged to pay for the damage as between him and the owner?

Objected to.

Question excluded.

Testimony closed.

42 RESPONDENT'S EXHIBIT A.

United States District Court, Southern District of New York.

BOTANY WORSTED MILLS *against* JAMES KNOTT.

WINTER *against* JAMES KNOTT.

It is stipulated between the parties as follows:

Wet sugar was stowed in the No. 2 'tween-decks at Pernambuco. There was a wooden bulkhead not tight between this place and the forward or No. 1 'tween-decks, in which libellant's wool was stowed. There was no damage to the wool from sugar drainage until the ship was trimmed by the head at Para, as shown in the official log, which is offered in evidence. It was damaged by sugar drainage finding its way through the bulkhead and reaching the wool, at Para, or between Para and Port of Spain. After the ship was again trimmed by the stern at Port of Spain, none of the drainage from the sugar found its way into the forward 'tween-decks. The court may draw inferences.

(S'd) GEO. A. BLACK,
Proctor for Botany Worsted Mills.

(S'd) BUTLER, STILLMAN & HUBBARD,
Proctors for Winter.

(S'd) CONVERS & KIRLIN,
Proctors for James Knott.

New York, June 5th, 1896.

(Here follow bills of lading marked pp. 42*a*, 42*b*, & 42*c*.)

lition, by Wachsen &

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..... is Master for this present

bound for New York

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ed of the voyage)

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d ship, or from their stalls, however caused, or
f any goods shipped, risk of lighterage, to or
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kdown or injury to, or defect in hull, tackle, boi
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share in all expenses incurred just as if the a

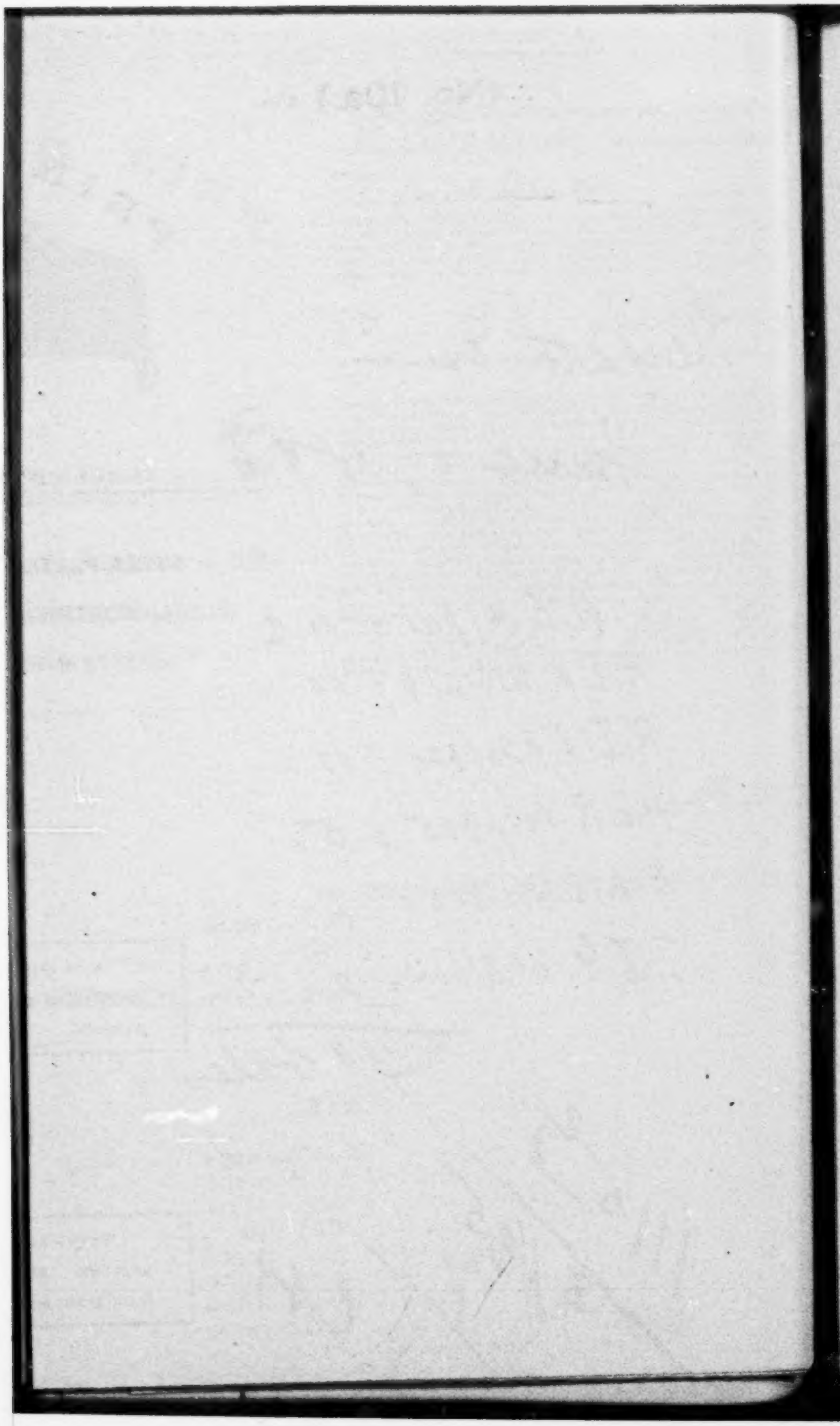
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York and Antwerp Rules, 1890.

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or Vessel, whether belonging to the Compa

FOLD OUT IS TOO LARGE TO BE FILMED



43 RESP'D'T'S EXHIBIT D, JUNE 5, '96.

Dates of arrival at and departure from each port touched at, with the freeboard and draught of water upon every occasion of the ship proceeding to sea.

Arrival or departure.	Date.	Hour.	Dock, wharf, port, or harbor at which the ship arrives or from which she proceeds to sea.	Draught of water in salt water at time of proceeding to sea.		Freeboard amidships corresponding to foregoing draught.	
				Forward.	*Aft.*	*Port.*	*Starboard.*
Arriv.	11.11.94	2 p. m.	Montevideo..... ..	20.6	20.4	6.6	6.6
Dep...	25.12.94	4 p. m.	Buenos Ayres.....	21.0	21.6	5.8	5.8
Arr...	2. 1.95	7.15 a. m.	Santos.....	20.8	20.9	6 2½	6.2½
Dep...	29. 1.95	1.30 p. m.	"	20.0	16.0	8.11	8.11
Arr...	31. 1.95	1 p. m.	Rio de Janeiro,.....	19.8	16.0	9.1	9.1
Dep...	7. 2.95	3 p. m.	"	15.6	20.0	9.2	9.2
Arr...	12. 2.95	4.30 p. m.	Bahia.....	15.4	19.6	9.3	9.5
Dep...	14. 2.95	3 a. m.	"	15.7	20.0	9.1½	9.1½
Arriv.	16. 2.95	8 a. m.	Macio	15 6	19.9	9.3½	9.3½
Dep...	17. 2.95	5 p. m.	"	14.6	21.6	8.11	8.11
Arriv.	19. 2.95	2.30 p. m.	Pernambuco	14.6	21.3	8.9½	8.9½
Dep...	24. 2.95	4 p. m.	"	21.6	22.4	5.—	5.—
Arriv.	3. 3.95	9 a. m.	Para	21.3	21.9	5.5	5.5
Dep...	10. 3.95	8 p. m.	"	19.6	17.6	8.5	8.5
Arriv.	16. 3.95	8 p. m.	Port of Spain, Trinidad.	19.3	17.6	8.6½	8.6½
Dep...	18. 3.95	11 p. m.	" ..	18.0	19.0	8.5	8.5
Arriv.	19. 3.95	2.30 p. m.	Grenada.....	18.0	18.11	8.5½	8.5½
Dep...	20. 3.95	1 a. m.	"	18.0	18.11	8.5½	8.5½
Arriv.	20. 3.95	6.30 p. m.	Port Castries (St. Lucia).	17.5	21.5	7.6	7.6
Dep...	20. 3.95	11.45 p. m.	" ..	17.6	21.9	8.3½	8.3½
Arr...	31. 3.95	11.15 p. m.	New York.....	17.3	20.3	8.1	8.1

I hereby certify the foregoing to be a true extract from the log of the *Portuguese Prince* (official No. 84073), deposited on record in this office.

[SEAL.]

J. N. GARDNER,
Assistant Registrar General.

Fee 1 / 8.

W. H. L.

44 RESPONDENT'S EXHIBIT E.

Lying at Pernambuco, Tuesday 19th Feb.—The day commenced with fine weather, light breeze—10.45 a. m. Hove short, 11 a. m. Got under weigh full speed ahead and proceeded into port in charge pilot. At 11.45 passed fort on reef going dead slow. At noon let go anchor and proceeded to moor ship. 12.15 rung off engines. 2.30 p. m. finished mooring. 1 p. m. commenced discharging cargo from No. 2 hold. 4 p. m. finished No. 2 hold and started at No. 4 hold. During the night until midnight working cargo with two gangs, No. 2 and No. 4, holds.

Feb. 20, Wednesday, lying at Pernambuco.—1 a. m. Started working cargo again. During the day discharging aft and taking sugar No. 2 hold. Weather fine throughout. From 6 p. m. till midnight work- cargo No. 2 and 3 taking sugar with two gangs. Finished discharging aft. 3 p. m. cleared up hold ready for taking in general cargo.

FEB. 21ST, THURSDAY.

1 a. m. Started work again taking sugar No. 2 and 3 hold. 6 a. m. day gangs started working with three gangs taking in sugar for New York, in No. 2 and 3 holds and general cargo for Para No. 4 hold. Fine weather throughout. 5.30 p. m. day gangs finished work for the day. 6 p. m. night gangs started working, one gang only, sugar in No. 2 hold. 10 p. m. stopped working crude sugar and commenced taking in general cargo for Para in fore part No. 2 hold. At midnight fine weather.

FEB. 22D, FRIDAY.

1 a. m. Started work again on No. 2 with general cargo for Para. 6 a. m. night gang finished work. 6.30 a. m. day gangs started work, one gang aft and one for'ard, both taking in cargo for Para. 5.30 p. m. finished, working cargo for the day and did not do any night work this night.

45 FEB. 23D, SATURDAY.

6 p. m. Commenced work taking in general cargo aft and sugar for'ard in No. 3 hold. At noon stopped taking in sugar as ship is too deep for taking any more. During the afternoon working general cargo fore and aft. 5.30 p. m. finished for the day. Weather fine throughout.

FEB. 24TH, SUNDAY.

6 a. m. Commenced taking in remainder of general cargo alongside, working with one gang. 11 a. m., finished taking in general cargo and proceeded to make everything ready for leaving port. Weather fine throughout. Draft when finished taking cargo was for'ard 21 ft. 6 ins., aft 22 ft. 4 ins. 4 p. m. hove short and proceeded to get under weigh, 4.10 slow ahead, 4.35 p. m. stopped to discharge pilot, 4.40 full sp'd ah'd. At 5.15 set course east, ship rolling, secured all gear about the deck. 6.30 stopped for engineers, Pernambuco W. bearing N. 65° W., at 8 fine clear wr. Pernambuco W. bearing N. 63° W. 8.15 full sp'd ah'd. 8.30, 8 to 12 p. m. streamed log. Set course N. E. by N. Light easterly breeze and smooth sea. Weather fine and clear. At midnight log 38'.

46 *Log of the S. S. "Portuguese Prince" from Pernambuco to Para.*

H.	Course.	K.	Wind.	Force.	Weather.	Bar.	Monday, 25th Feb'y, 1895.
1	N. E. by N.	9½	East'ly...	2	Fine.....	.....	1 a/c to N. N. E.
2	N. N. E....	7½	" ..	"	.....	.....	Light breeze & fine
3	"	7½	" ..	"	.....	.....	weather with S. E. swell.
4	"	7½	" ..	"	.....	29.82	4 a/c to N. by E. Log 68
5	N. by E. ..	....	" ..	"	.....	.....	miles.
6	"	....	" ..	"	"	.....	Dev. 2° E. by Arnpr.
7	"	....	" ..	"	"	.....	Washed decks
8	"	....	" ..	"	"	29.80	Fine clear wr. 101
9	"	....	" ..	4	Squally..	.....	Error by Clo. 13m. 30s.
10	North	....	E. N. E..	3	" ..	.....	loosing daily 1 5.
11	"	....	" .	....	Overcast.	.....	9 a. m. a/c north log
12	"	....	" ..	....	" ..	.....	12′ first part of watch
1	"	....	" ..	....	.....	29.86	squally with rain
							Afterwards light breeze & light sea with overcast & dull weather.
							S. GILSON.
2	"	....	" ..	....	Cloudy ..	.....	Light breeze & cloudy
3	"	....	" ..	....	" ..	.....	weather with easterly swell.
4	"	...	" ..	....	" ..	29.80	Log 33 miles.
5	"	....	" ..	....	" ..	.....	5 Dev. by Azt. 2° E.
6	"	...	" ..	....	" ..	.....	6 cleared up decks.
7	"	....	" ..	....	" ..	...	
8	"	...	" ..	....	" ..	29.80	Cloudy & fine wr. log 67′.
9	"	8	" ..	3	Clear....	.....	10.35 p. m. a/c N. N. W. log 86′
10	"	8	" ..	"	"	.....	Light breeze & smooth sea
11	N. N. W...	8	" ..	"	"	.....	Weather fine & clear
12	"	8	" ..	"	"	.....	At midnight log 99′
							S. GILSON.

47 *Log of the S. S. "Portuguese Prince" from Pernambuco to Para.*

H.	Course.	K.	Winds.	Force.	Weather.	Bar.	Tuesday, 26th Feb'y, 1895.
1	N. N. W.....	8	E. S. E..	4	Fine	.....	2 a. m. a/c to N. W. by N. ½ N. log 16′
2	"	8	"	"	"	.....	Moderate breeze & fine clear weather.
3	N. W. by....	8	"	"	"	.....	
4	N. ½ W.....	8	"	"	"	29.75	A. a/c to N. W. by N. log 33.
5	N. W. by N. ...	...	"	"	"	.....	
6	"	....	"	"	"	.....	Dev. ampl. Nil.
7	"	....	"	"	"	.....	Washed decks.
8/20	"	....	"	"	"	29.75	Fine clear wr. 66
9	N. W	8	E. N. E .	3	"	.. ...	8.20 a/c N. W. log 68.
10	"	8	"	"	"	.....	Light to mod. breeze &
11	"	8	"	"	"	.....	smooth sea. Weather fine, but cloudy.
12/	"	8	"	"	"	29.74	At noon a/c N. W. ½ W. Dist. run 185 miles.
1	N. W. ½ W ..	8	"	"	Squally..	.....	2 a squall of rain passed over.
2	"	8	"	"	"	.....	Moderate breeze & fine with
3	"	8	"	"	Fine	.....	Easterly swell. log 36 miles.
4	"	8	"	"	"	29/70	
5	"	"	"	...	.....	.....	Error pr. azt. 12° W.
6	"	"	"	....	.....	.....	Cleared up decks.
7	"	"	"	....	.....	.....	
8	"	"	"	....	.....	29.70	Cloudy threat'g rain. log 68′
9	"	8	Easterly.	3	Cloudy ..	.....	
10	"	8	"	"	"	.....	Light to moderate
11	"	8	"	"	"	29.72	breeze & slight following sea. Weather
12	"	8	"	"	"	.....	fine but cloudy towards midnight. Showery. log 106′

S. GILSON.

56 *Log of the S. S. "Portuguese Prince" from Para to Trinidad.*

H.	Courses.	K.	Winds.	Force.	Weather.	Bar.	Remarks, Wednesday, 13th March.
1	N. N. W...	8	N. E...	4	Cloudy...	.....	
2	" ...	8	" ...	"	" ...	.....	Moderate breeze & cloudy
3	" ...	8	" ...	"	" ...	.....	weather with heavy N. E.
4	" ...	8	" ...	"	" ...	29.54	swell. Ship rolling heavily at times.
5	" ...	....	" ...	"	"		log 33 miles.
6	" ...	....	" ...	"	" ...	.....	Dev. *azmuith* 3° E.
7	" ...	...	" ...	"	" ...	.....	7 a/c N. W. by W.½ W.
8	N.W. by W. ½ W.	....	" ...	"	" ...	29.56	Cloudy with rain. log 68′
9	"	8	" ...	"	" ...	....	Mod. trades & sea & heavy swell.
10	"	8	" ...	"	" ...	.....	Weather dull & overcast.
11	"	8	" ...	"	" ...	.....	Latterly drizzling rain.
12	"	8	" ...	"	Raining .	29.58	At noon a/c to N. W. ½ W.
1	N. W. ½ W.	9	" ...	5	" ..	.....	Distance run 243 miles.
2	"	9	" ...	"	" ..	.....	
3	"	9	" ...	"	Cloudy...	.....	Fresh trade & cloudy with
4	.....	9	" ...	....	" ...	29.55	squally appearance to N. E.
5	"	....	" ...	....	" ...	.....	& high N. E. swell. Ship rolling considerably.
6	"		" ...	....	" ...	.....	log 36 miles
7	"		" ...	....	" ...	.....	Sun obscured throughout.
8	"	8½	" ...	..	" ...	29.55	Same wr. log 71′
9	"	8½	" ...	"	" ...	.....	
10	"	8½	" ...	"	" ...	.....	Mod. trades & sea weather
11	"	8½	" ...	4	" ...	.....	cloudy.
12	"	8½	" ...	"	" ...	.....	At midnight, log 106′

S. GILSON.

57 *Log of the S. S. "Portuguese Prince" from Para to Trinidad.*

H.	Courses.	K.	Wind.	Force.	Weather.	Bar.	Remarks, Thursday, 14 March
1	N. W. ½ W.	8½	N. E...	5	Cloudy ..		
2	"	8½	" ...	"	" ..	.....	Strong breeze & cloudy
3	"	8½	" ...	"	" ..	.....	weather, heavy N. E. swell
4	"	8½	" ...	"	" ..	29.56	still running and ship roll-
5	"	....	" ...	..	" ..	.....	ing heavily, log 40′
6	"	....	" ...	....	" ..	.....	Cloudy & fine high sea.
7	"	....	" ...	....	" ..	....	Error amp. 1° W.
8	"	...	" ...	....	" ..	....	Set one sail.
9	"	8½	E. N. E.	4	" ..	29.58	Cloudy & fine. 74′.
10	"	8½	"	"	" ..	.....	9 a. m. Foretopsail bent &
11	"	8½	"	"	" ..	.....	set. Mod. breeze & sea.
12	"	8½	"	"	" ..	29.56.	Weather fine but cloudy.
							Lat. 7′ 53 lon. 53. 50.
1	N. W. by W.	8½	"	5	Fine ...	.....	Dist. run, 230 miles.
2	½ W.	8½	"	"	" ..	.....	a/c N. W. by W. ½ W.
3	"	8½	"	"	" ..	.....	Fresh breeze & fine weather
4	"	8½	"	"	"	29.60	with N. E. sea. log 36.
5	"	...	"	...	" ...	.....	
6	"	....	"	....	"	.....	Error azt. 1° W.
7	"	....	"	....	" ..	.....	
8	"	....	"	....	"	29.61	Same wr. log 71′
9	"	8½	"	4	"	.....	
10	"	8½	"	"	"	.....	Mod. trades & sea.
11	"	8½	"	"	"	.....	Weather fine & clear.
12	"	8½	"	"	" ...	29 60	At midnight log 105′.
	"						S. GILSON.

58 *Log of the S. S. "Portuguese Prince" from Para to Trinidad.*

H.	Courses.	K.	Winds.	Force.	Weather.	Bar.	Remarks, Friday, 15th March, 1895.
1	N. W./ W.	8½	N. E.	5	Fine		
2	½ W.	8½	"	"	"		Fresh trade & fine weather
3	"	8½	"	"	"		High N. E. sea still running
4	"	8½	"	"	"	29/64	Ship lurching heavily. log 44′
5	"		"		"		
6	"		"		"		
7	"		"		"		Error pr. azt. Nil.
8	"		"		"	29.68	Fine clear wr. log 80.
9	"	9	"	4	"		
10	"	9	"	"	"		Mod. breeze & sea
11	"	9	"	"	"		Weather fine & clear
12	"	9	"	"	"	29.67	Dist. *rem.* 238 miles
1	W./N. ¾ N.	9	N. E.	5	Fine		Noon a/c to W. by N. ¾ N.
2	"	9	"	"	"		Fresh breeze & fine weather
3	"	9	"	"	"		with N. E. swell. log 39 miles.
4	"	9	"	"	"	29/64	
5		9	"	"	"		
6		"	"	"	"		Error pr. agr. O ½ W.
7		"	"	"	Squally	29/64	
8		"	"	"	"		Squally with rain a/c W. N. W.
9	W. N. W.	9½	"	"	"		
10	"	9½	"	"	"		
11	"	9½	"	"	"		Dry squally weather with strong breeze & following sea.
12	"	9½	"	"	"		Weather fine & clear. Midnight log 117′

S. G.

59 *Log of S. S. "Portuguese Prince" from Para to Trinidad.*

H.	Courses.	K.	Winds.	Force.	Weather.	Bar.	Remarks Saturday, 16th March, 1895.
1	W. N. W....	9	N. E....	5	Squally..	.....	
2	" .. .	9	"	"	" ..	.....	Fresh breeze &
3	"	9	"	"	" ..	.....	squally with light showers of rain.
4	"	9	"	"	" .	29.64	4 a. m. Log 56 miles.
5	"	"	"	"	" ..	.....	
6	"	"	" ...	"	" ..	.....	Error ampl. Nil.
7.30	Orders.....	"	"	"	" ..	.....	6.30 obs'd land on so. bow
8	"	"	"	"	" ..	29.72	a/c orders log 88
9	"	9	"	4	Fine.....	.....	9 a. m. a/c W. by S.
10	W. by S. ½ S. .	9	"	"	"	....	½ S. log 90' 11.15
11	" ..	9	"	3	"	.....	Tobago light-house about dist. 6 miles. Light to mod. breeze & smooth sea. Weather fine. Log at noon 225.
12	" ..	9	"	"	"	29.70	Dist. run, 215 miles.
1	S. by W. ½ W.	9½	"	3	"	.....	
2	"	9½	" ...	"	"	.....	2.35 a/c to S. W. by
3	S. W. by W. ½ W.	9½	" . ..	2	"	.....	W. ½ W. log 26' Light breeze & fine but cloudy weather. Log 38 miles.
4	Orders.....	9½	"	"	"	29.67	
5	"	9½	" ..	"	"	.....	5.50 p.m. entered the Bocas. 6.10 p. m. through Bocas &
6	"	9½	" ...	"	"	.....	heading for Port of Spain. 6.55 p. m.
7	"	9½	" ...	"	"	.....	slowed down. 7.45 stopped & let go anchor in 3¾ fthms.
8	"		"	"	"	.....	water. 7.50 rung off light breeze & fine weather.

SUNDAY, 17*th March.*

Day commenced with fine weather & light breeze. 6 a. m. put gig in the water. 7 a. m. customs cleared ship. Did not work cargo during the day. Weather fine throughout.

60 MONDAY, 18*th March.*

6 a. m. Commenced taking in cargo for New York into No. 5 hold. Weather fine during the day. 6 p. m. worked two hatches 4 & 5. 10.30 finished cargo. Made ready for sea. 11 p. m. hove short. 11.10 got under weigh slow astern. 11.15 full sp'd ah'd. Steering W. ½ S.

Log of the "Portuguese Prince" from Trinidad Toward Grenada.

TUESDAY, 19*th March*, 1895.

Hours.	Courses.	Knots.	Wind.	Force.	Weather.	Bar.	Remarks.
1	Orders.....	8	N. E..	5	Clear..	.....	
2	North.....	8	" ..	"	" ..	.....	1.20 passed through Bocas, streamed log & set course north. Mod. breeze & clear weather with N. E. swell log 24′
3	"	8	" ..	"	" ..	.....	
4	"	8	" ..	"	" ..	29.80	
5	"	8	" ..	"	" ..	.....	Error amp. Nil.
6	"	9	" ..	"	" ..	.....	6 a. m. sighted Grenada.
7	N. by E.....	8	" ..	"	" ..	29.84	8 a/c N. by E. Fine cloudy weather log 57. 8.30 a/c N. by E. ½ E. during forenoon steering by orders.
8	"	8	" ..	"	" ..	.....	
9	N. by E. ½ E.	8	" ..	"	" ..	.....	
10	"	8	" ..	"	" ..	.....	11.15 slow ah'd. 11.30 let go anchor and waited for pratique.
11	Orders.....	8	" ..	"	" ..	.....	
12	"	8	" ..	"	" ..	.....	1.10 p. m. Doctor came off & gave the ship pratique. 1.20 got under

weigh and proceeded to the wharf in charge of pilot. 2 p. m. arrived alongside wharf and moored ship. 2.30 p. m. commenced taking in bunker coals and cargo. At 10 p. m. finished taking in cargo. 11.30 p. m. stopped taking in coals. Weather fine throughout.

61 United States District Court, Southern District of New York.

BOTANY WORSTED MILLS
vs.
JAMES KNOTT.

HENRY P. WINTER ET AL.
vs.
THE SAME.

In admiralty—Damages to cargo.

George A. Black and W. Mynderse, for libellants.
Convers & Kirlin, for defendant.

BROWN, *J.*:

The respondent, the owner of the British steamship *Portuguese Prince*, is sued in the above libels for damages to two lots of wool in bales shipped on board at Pernambuco, arising from contact of

the bales with sugar drainage upon the voyage to New York, where she arrived on March 30, 1895.

The bales of wool were stowed on end in the No. 1 (forward) compartment of the 'tween-decks; and wet Pernambuco sugar, from which there is always some drainage, was stowed on the same deck, next aft of the wool and separated from it by a temporary bulkhead. There was sufficient means of escape for the sugar drainage, provided it ran aft as designed; and it did run aft so long as the ship was not down by the head. But the ship called at several ports after leaving Pernambuco, among others at Para; and through changes in the cargo loading at Para she was considerably down by the head when she left that port on March
62 10th, and so continued until her arrival at Port of Spain on March 18th, where the error in her trim was corrected. But during this interval the sugar drainage ran forwards, where it had no means of escape; and the temporary bulkhead not being tight, the drainage ran under or through the temporary bulkhead and accumulated forward of it so as to extend above the dunnage on which the wool was laid, and thus damaged the lower tiers of bales. No damage occurred before the ship got down by the head at Para, nor after her trim was righted at Port of Spain.

The bill of lading contains numerous exceptions of liability, including "damage by stowage, leakage, &c., though caused by the negligence of the master," &c. It also provides that the contract shall be governed by the law of the flag (English); and it is admitted that by the English law such exceptions are valid. The respondent relies on these exceptions of the bill of lading, and upon the United States Harter act (act of February 13, 1893, 27 St. L., 445; 2 Supp. R. S., 81, sec. 3).

I am of opinion that the exemption from liability for damages arising through error or fault "in the management of the vessel," does not extend to a case like the present, though the question has caused me no little embarrassment. The primary cause of the damage was negligence and inattention in the loading or stowage of the cargo, either regarded as a whole, or as respects the juxtaposition of wet sugar and wool bales placed far forward. The wool should not have been stowed forward of the wet sugar unless care was taken in the other loading, and in all subsequent changes in the loading, to see that the ship should not get down by the head. There was no fault or defect in the vessel herself. She was constructed in the usual way and was sufficient. But on sailing from Para she was a little down by the head, through inattention during the changes in the loading to the effect these changes made in the trim of the ship and in the flow of the sugar drainage. She was not down by the head more than
63 frequently happens. It in no way affected her seagoing qualities; nor did the vessel herself cause any damage to the wool. The damage was caused by the drainage of the wet sugar alone. So that no question of the unseaworthiness of the ship arises. The ship herself was as seaworthy when she left Para as when she sailed from Pernambuco. The negligence consisted in stowing the

wool far forward without taking care subsequently that no changes of loading should bring the ship down by the head. I must, therefore, regard the question as solely a question of negligence in the stowage and disposition of cargo, and of damage consequent thereon, though brought about by the effect of these negligent changes in loading on the trim of the ship.

It is urged that the regulation of the trim of the ship is a part of the "management of the ship," and hence within the Harter act. And so it doubtless is, wherever the regulation of the trim is designedly done, and done primarily with reference to the ship, and for the benefit of the ship, or with a view to her seagoing qualities. Here nothing of that kind was contemplated. The change of trim was merely incidental, the mere negligent result of the changes in the loading, no attention being given to the effect on the ship's trim, or on the sugar drainage. The handling of the ship's appliances with reference to the navigation or the safety of the ship, for the purposes of the voyage, belong to "the management of the ship." Thus in the *Silvia*, 64 Fed., 607, where the officers had neglected to close the iron shutter of a porthole, in consequence of which in rough weather sea water came in and damaged the cargo, it was held by this court that the neglect arose in the "management of the vessel," and was covered by the Harter act, even though from the inaccessibility of the open port, as considered by this court, the open port amounted to unseaworthiness; because the neglect consisted in not making use of the things supplied by the owner to put and keep the ship herself in a proper condition to meet stormy weather. The result was affirmed in the court of appeals (15 C. C. A., 362; 68 Fed., 230) though the port was
64 deemed easily enough accessible for closing to allow the ship to be called seaworthy.

So in the recent case of *The Glenochil* (1896) Prob. Div., 10, where, at the close of the voyage, and before the cargo had been delivered, it was found necessary to fill the ballast tanks with water in order to stiffen the ship; but on the voyage the sounding pipe and casing had become cracked and broken, so that in filling the tanks the water escaped through the breaks and damaged the cargo; the failure to examine the pipes before turning on the water was found to be negligence, but within the Harter act, because the negligent acts were done with the ship's appliances and for the ship's safety, and hence were a part of "the management of the ship:"

"The negligence," says President Jeune, "consisted in the mismanagement of part of the appliances of the ship; a mismanagement which arose because it was intended to do something for the benefit of the ship, viz., to stiffen her—the necessity for stiffening arising because part of the cargo had been taken out of her. It was further considered that the Harter act is designed to 'prevent exemptions in the case of direct want of care in respect to the cargo, and to permit exemption in respect to the faults primarily connected with the navigation or with the management of the vessel, and not with the cargo.'"

In the same case Sir Gorrell Barnes observes that it was a fault

in the management of the vessel in doing something necessary for the safety of the ship herself; that in the first and third sections of the Harter act "there will be found a strong and marked contrast in the provisions which deal with the care of the cargo, and those which deal with the management of the ship herself; and that where the act done is done for the safety of the ship herself, and not primarily done at all in connection with the cargo, that
65 must be a matter which falls within the words 'management of said vessel.'"

On the other hand, in the case of the Ferro (1893) Prob. Div., 38, where the bill of lading contained an exemption from responsibility from damage for any act, &c., "in the navigation or management of the ship," it was held that the improper stowage of oranges by which they suffered damage was not covered by the term "management of the ship."

A further reason for excluding the present case from the exemption of the 3d section of the Harter act is found in the express prohibitions of the first section against the insertion of any stipulations in the bill of lading for relieving the vessel or owner from "loss or damage arising from negligence, or failure in proper loading or stowage of all lawful merchandise committed to their charge." The evident intent is that ship and owner must answer for such damages. The general words of the 3d section, "management of the vessel" cannot receive a construction which would contradict the evident and particular intent of the first section. The different parts of the same act must be construed harmoniously, so far as possible. The scope of a general phrase must be restricted so as not to contradict the more particular provisions of other parts of the same act. And so here, since this damage arose through negligence in the particular mode of stowing and changing the loading of cargo, as the primary cause, though that cause became operative through its effect on the trim of the ship, this negligence in loading falls within the first section. The ship and owner must, therefore, answer for this damage, and the 3d section is inapplicable.

2. It is contended, however, that if the negligence be treated as one of loading and stowage the express exemptions of the bill of lading apply, and exempt the ship under the stipulation that the English law shall govern, since the English law upholds such exemptions.

66 In the case of Baetjer *v.* Compagnie Generale, 59 Fed., 789, it was considered that such stipulations should be upheld when made within a foreign jurisdiction that sustains them, and when the damage and the cause of action arose within that foreign jurisdiction. In the Trinacria (42 Fed., 863) however it was said to be a "wholly different question whether the courts of this country should sustain contracts or stipulations as regards acts performed and designed to be performed either on the high seas or within the exclusive jurisdiction of this country, when such stipulations are by our law void on the ground of public policy." In the present case the contract was not made nor was any part of it intended to be performed within British jurisdiction. In the absence of any proof

48 *Log of the S. S. "Portuguese Prince" from Pernambuco to Para.*

H.	Course.	K.	Wind.	Force.	Weather.	Bar.	Wednesday, 27th Feb'y, 1895.
1	N. W. ½ W ..	8	East'ly ..	3	Showery.	.....	
2	"	8	"	"	"	.....	A. M. Light breeze,
3	"	8	"	"	.....	.....	cloudy with occasional showers of small rain.
4	"	8	"	"	"	29.68	Log 41′ miles I. F.
5	"	...	"	"	"	.....	
6	"	....	"	"	"	... .	Error pr. arnpc. 11°W.
7	"	....	"	"	"	... ..	Washed decks.
8	"	....	"	"	"	29.68	Cloudy with rain at times.
9	"	8	"	"	Cloudy..	....	Light to mod. breeze
10	"	8	"	"	"	.....	with slight following sea. Weather fine but cloudy. At noon a/c N. W./W.
11	"	8	"	"	"	.....	
12	"	8	"	"	"	29.66	Dist. run 225 M.
1	N. W./W ...	8½	"	"	... .	.....	
2	"	8½	"	"	.....	.....	
3	"	8½	"	"	.....	.....	Moderate breeze &
4	"	8½	"	"	"	29.62	cloudy weather with easterly swell. log 35 miles.
5	"	....	"	....	"	.....	Error azh. 10½ W. I. F.
6	"	....	"	....	"	.....	Cleared up decks.
7	"	....	"	....	"	.....	Lights attended to.
8	"	....	"	....	"	29.62	Cloudy & fine wr. 69.
9	"	8	Var-ble .	3	"	.....	
10	"	8	"	"	"	.....	Light to mod. breeze with following sea. Weather cloudy with light clouds.
11	"	8	"	"	Showery.	.....	Vessel rolling heavy at
12	"	8	"	2	"	29.64	times & shipping water occasionally. log 105′

S. GILSON.

49 *Log of the S. S. "Portuguese Prince" from Pernambuco to Para.*

H.	Course.	K.	Winds.	Force.	Weather.	Bar.	Thursday, 28th February, 1895.
1	N.W.1 W.	8½	East...	3	Cloudy & showers.		
2	"	8½	" ...	"	"	.....	Light breeze & overcast with showers of heavy rain & N. E. swell.
3	"	8½	" ...	"	"	.....	
4	"	8½	" ...	"	"	29.63	log 40 miles
5	"	"	" ...	"	"	.....	I. F.
6	"	"	" ...	"	"	.....	Error amp, 10° W.
7	"	"	" ...	"	"	.....	Washed decks.
8	"	....	" ...	"	"	.....	Cloudy with rain log 72½
9	"	8½	" ...	"	Overcast.	....	9 a. m. a/c W. N. W.
10	N. N. W..	8½	" ...	4	"	.....	Mod. breeze & following sea
11	" ..	8½	" ...	"	"	.....	Weather overcast
12	" ..	8½	" ...	"	"	29.65	
1	" .	8½	" ...	"	"	.....	
2	" ..	8½	" ...	"	"	.....	Moderate breeze & overcast with occasional swell rain & heavy easterly swell. vessel rolling considerably.
3	" ..	8½	" ...	"	"	.....	
4	" ..	8½	" ...	"	"	29.62	log 35 miles
5	" ..	"	" ...	....	"	... ..	
6	" ..	"	" ...	....	"	.....	Sun obscured throughout
7	" ..	"	" ...	....	"	.....	
8	" ..	...	" ...	...	"	29.61	Cloudy & o'cast log 68′
9	" ..	6	" ...	3	"	.....	
10	" ..	6	" ...	"	"	.....	Light breeze & slight following sea. Weather overcast & showery.
11	" ..	6	" ...	"	"	.....	
12	" ..	6	" ...	"	"	29.66	log 92′

S. GILSON.

50 *Log of the S. S. "Portuguese Prince" from Pernambuco to Para.*

H.	Course.	K.	Winds.	Force.	Weather.	Bar.	Remarks, Friday, 1st March /95.
1	W. N. W....	8½	Vble...	2	Cloudy ..	.....	1 a. m. a/c to west log 100
2	West	8½	" ...	"	"		2a. m a/c to W.½ S. log 109
3	W. ½ S.....	8½	" ...	"	" ..	.....	4 light variable winds &
4	"	8½	" ...	"	" ..	29.65	fine but cloudy. log 27
5	"	...	.....	...	.....	.....	miles.
6	.....	....	.....	....	.....	.....	Washed decks
7	.....	...	... ...	....	.....	.....	Error pr azh. 6° W.
8	....	....	.....	....	....	29.66	Cloudy & fine wr. 61
9	.....	....	... ...	....	....	.....	
10	.....	...	.....	....	.....	.....	
11	.....	....	.....	...	.. ..	.....	
12	.....	....	.....	....	.....	.. ...	a/c to W. by S. ½ S.
1	W. by S. ½ S.	8	N. E...	2	Clear ...	.....	Light breeze & fine
2	.....	8	" ...	"	"	.....	weather log 33 miles
3	"	8	" ...	"	"	.....	
4	"	8	" ...	"	"	29.68	
5	"	...	" ...	.....	"	.....	Error pr; azh. 50 W.
6	"	...	" ...	....	"	.....	Cleared up decks
7	"	....	" ...	..	"	.....	7 a/c W. ½ W.
8/25	W. ½ N.	....	" ...	...	"	29.70	Cloudy & fine wr. log 64′
9	W. by S. ½ S.	....	N. N. E.	3	Cloudy & hazy	.....	8/25a/cW. byS.½S. log68′ 9.15 slow ahd. a/c N. by E. log 75′
10	Various.....	....	"	"	"	.....	10.20 half spd a/c S. by W. ½ W. log 78′ 10.55 slow ahead a/c north.
11	"	....	"	"	"	.....	Mod. breeze & slight sea. Weather cloudy with hazy horizon. Sea covered with phosphorous. Not able to sight Italia light. At midnight log 85′
12	North.... ..	....	"	4	"	29.65	

S. GILSON.

51 *Log of the S. S. "Portuguese Prince" from Pernambuco to Para.*

H.	Course.	K.	Wind.	Force.	Weather.	Bar.	Saturday, March 2nd, 1895.
1	North	4	V'blo. ..	2to4	Rain..	....	2 a. m. a/c to S. 5½ W. log 94.
2	S. ½ W....	4	"	"	" ..	.....	3 " a/c to north log 98.
3	" ...	4	" ...	"	" ..	.....	Unsteady wind & cloudy with frequent showers of rain.
4/15	North	4	" ...	"	" ..	29.70	4 log 102 miles 4.15 a/c south.
5	South	4½	"	"	" ..	....	4.30 ½ speed. Cloudy with rain.
6	"	5½	"	"	" ..	....	5.15. F. S. Cloudy with rain.
7	"	8	" ...	"	" ..	.....	Sun obscured for sights.
8	"	8	" ...	"	" ..	29.	Cloudy with rain 129.
9	E. N. E..	....	"	3	Heavy rain squalls.	..	8.15 hauled the log in & eased the engines down. Weather thick & a/c E. N. E. 8.30 a. m.
10	By orders.	..	"	4	" ..	.....	Went astern to take soundings, 17 fathoms water; then slow ah'd 10 a. m. slow astern to take soundings. 15½ fathms.
11	"	...	"	"	" ..	.....	Then went slow ah'd. Raining heavily all the forenoon
12	"	...	" ...	3	" ..	29.76	till 11.30 a. m. 12 a. m. sounded & got 15 fathms water. 11.45 steamed up set course S. by E. & full sp'd ah'd.
1	Various...	....	East'ly..	4	Cloudy	.....	Went aloft & sighted land from S. by E. to S.
2	.....	....	" ...	"	" ..	.....	1 Ran down towards pilot schooner lying in Sultinas bay.
3	.....	....	"	"	" ..	.....	3.20 Stopped for pilot.
4	By pilot's orders.		"	"	" ..	.....	3.30 Received pilot & proceeded immediately. 4. Moderate breeze & cloudy threatening appearance.
5	"	....	" ...	"	" ..	.....	
6	"	....	"	"	" ..	.....	Sun obscured.
7	"	....	"	"	" ..	.....	7 obs'd Para l't ship W. by S.
8	"	....	"	"	" ..	29.70	Cloudy & o'cast wr.
9	P. "	....	"	"	Clear..	.....	8.30. Passed Para River Light vessel.
10	"	....	"	"	" ..	.....	10.20 Passed Pt. Tapio light.
11	"	...	Southerly	2	" ..	.....	Light breeze. Weather fine & clear.
12	"	...	"	"	" ..	29.72	S. GILSON.

52 *Log of the S. S. "Portuguese Prince" from Pernambuco to Para.*

H.	Course.		Wind.	Force.	Weather.	Bar.	Sunday, 3rd March, 1895.
1	By pilot's orders.	....	N. e'ly..	2	Cloudy	.....	A. M. 0.45 Passed Colores light.
2	"	...	" ..	"	"	....	2.20 Chapeo Virado light.
3	"	....	" ..	"	"	....	3.20 Anchored in 7 fathoms water veered to 35 faths. cable on the hawser. Calm & cloudy weather.
4	"	....	" ..	"	"	29.72	
5	"	....	" ..	"	"	.....	9.30 a. m. Passed fort below
6	"	....	" ..	"	"	.....	Para & eased down half sp'd
7	"	...	" ..	"	"	.....	8.45 slow 8.50 half sp'd astern
8	"	....	" ..	"	"	.....	& let go anchor in 3¼ fathoms
9	"	....	" ..	"	"	... .	water, half way between fort
10	"	....	" ..	"	"	.....	& town Para. 9.15 hove up again dropped a few lengths astern as water was too shallow and finally anchored in 4 fathoms water & moored with 30 fthms. water's edge & waited till there was enough water to allow the vessel to pass. During the forenoon landed mail & passengers. During the afternoon heavy squalls rain. Towards evening weather a little more settled.

Monday, 4th March, 1895, lying — Para river.

6 a. m. Made everything ready for discharging cargo. Weather cloudy. 6.50 hove short. 7.5 got under weigh and proceeded further up the river. 7.45 let go anchor off the town in four fathoms water & moored with both anchors. Started cargo 9 a. m. But had to stop for heavy rain which lasted till 10.30 a. m. Then commenced discharging deck cargo fore & aft. During the afternoon discharged all Para cargo from No. 3 hold & commenced on No. 2 5.30 p. m., finished work for the day. During latter part of the day till midnight weather fine. Working with two gangs.

Tuesday, 5th March, 1895, lying at Para.

The day commenced with fine weather, 7 a. m. Started discharging from No. 1 & 4 holds. During the forenoon weather cloudy and threatening. 12.40 p. m. had to stop for rain. 1.10 p. m. started again 2 p. m. had to stop for rain which came down heavily and lasted for the remainder of the day & evening, so were not able to work any more today. Working two gangs.

53 Wednesday, 6th March, lying at Para.

The day commenced with cloudy but dry weather, 7 a. m. started working cargo during the forenoon till 11 o'clock rain kept off during the time men were at breakfast raining heavily. At noon cleared up & started again. At 2 p. m. raining again & had to stop for half hour. At 4.30 p. m. had to finish working cargo for the day, as it rained unceasingly from this time till about 9 p. m. During the day working cargo out of No. 5 hold & lazarette aft & No. 1 & 2 for'ard. Working three gangs.

Thursday, 7th March, lying at Para.

7 a. m. Commenced working cargo with three gangs, 2 for'ard and one aft. Were delayed for half an hour during the afternoon by rain, otherwise weather was fine the remainder of the day. 5.30 p. m. finished work for the day.

Friday, 8th March, lying at Para.

During the day weather fine, no stoppages during the day working three gangs from 7 a. m. to 5.30 p. m.

Saturday, 9th March, lying at Para.

7 a. m. Commenced working cargo, two gangs only, one forward and one aft. 12.30 p. m. finished discharging all Para cargo forward and started on No. 5 lower hold. 5.30 p. m. finished for the day. Weather cloudy but no rain till evening.

Sunday, 10th March, lying at Para.

7.45 a. m. Commenced working cargo No. 4 and 5 holds with two gangs. Fine weather throughout. 5.30 finished discharging all Para cargo; lowered derricks, etc., and made everything ready for sea. 7.35 p. m. commenced to heave up the anchor. 7.50 weighed anchor and slow astern. 8 p. m. full speed ahead and proceeded down the river. Weather fine, steering by pilot's orders. At 11.45 p. m. passed Fort de Para light. At midnight total eclipse of the moon.

54 *Log of the S. S. "Portuguese Prince" from Para to Trinidad.*

H.	Courses.	Knots.	Winds.	Force.	Weather.	Bar.	Remarks.
a. m.							
1	N. N. W.	8	N. E.	5	Cloudy		Tuesday, 12th March, a/c to N. N. W.
2	"	8	"	"	"		
3	"	8	"	"	"		Fresh trade & cloudy with
4	"	8	"	"	"	29.50	occasional rain & mod.; N.
5	"	8	"	"	"		E. sea log 34′ J. E.
6	"	8	"	"	"		Sun clouded.
7	"	8	"	"	"		
8	"	8	"	"	"	29.54	Cloudy & squally, log 170′
9	"	8	"	"	"		
10	"	8	"	"	Raining		Strong trades & mod. sea.
11	"	8	"	"	"		Weather squally & with
12	"	8	"	"	Cloudy	29.52	heavy showers of rain.
1	"		"		"		At noon more settled. Dist. run 193′ min.
2	"		"		"		Fresh breeze & cloudy with
3	"		"		"		N. E. swell, ship rolling &
4	"		"		"	29.50	lurching heavily at times,
5	"		"		"		log 32 miles.
6	"		"		"		Sun obscured throughout.
7	"		"		"		
8	"		"		"	29.50	Cloudy with rain, log 64.
9	"	8	"	4	"		
10	"	8	"	"	"		Mod. trades light sea.
11	"	8	"	"	"		Heavy swell from N. E. ves-
12	"	8	"	"	"	29.54	sel rolling about. At mid- night log 100.

S. GILSON.

55 *Log of the S. S. "Portuguese Prince" from Para to Trinidad.*

H.	Courses.	K.	Winds.	Force.	Weather.	Bar.	Remarks.
1	Pilot orders		V'ble				Variable wind with heavy showers of rain & dull cloudy weather. J. F.
2							
3							
4			W		Rain	29.60	4.15 passed Bank lt. ship rain continually sun obscured throughout
5	Orders		"		"		
6	"		"		"		
7	"		"		"	29.62	7.32 passed River Para lt. ship cloudy with heavy rain. 8.15 stowed anchors & pilot left ship. 8.20 full spd ahd. Courses till 11.30 a. m. were various. 11.30 set course N. by W. log 20′ During forenoon raining heavily the whole time.
8	"		"		"		
9	"		"		"		
10	"		Var'ble		"		
11	"		"		"		
12	N. by W		"		"	29.58	At noon log & reset
1	"		N. E.		Cloudy		Run since leaving about 100 miles
2	"		"		"		
3	"		"		"	29.54	Light breeze & dull cloudy weather with N. E. swell.
4	"		"		"		
5	"		"		"		log 35 miles J. F.
6	"		"		"		Dev. by azh. 3° 00′ E.
7	"		"		"		
8	"		"		"	29.50	Cloudy & o'cast.
9	"	8½	"	4	"		Strong breeze & mod. sea.
10	"	8½	"	"	"		
11	"	8½	"	"	"		Weather cloudy. At midnight a/c N. N. W. log 100.
12	"	8½	"	"	"		

S. GILSON.

of the law either at the port of shipment or at Para, where this negligence occurred, there is no presumption that the law of either place differs from our own. The damage arose upon the high seas. Foreign law is administered only upon principles of comity. This cannot be allowed to subvert in our courts our own positive law, founded upon public policy, as respects contracts to be performed in part within our jurisdiction and in part upon the high seas.

In this respect the present case is precisely like that of Lewisohn *v.* The National S. S. Co., 56 Fed., 602, where similar stipulations were held invalid. In the case of The Silvia, 15 C. C. A., 362; 68 Fed., 230, 231, it is said by the court of appeals that the carriers' "responsibility to the cargo-owner who sues in the courts of this country cannot be curtailed in any of the particulars prohibited by the (Harter) act." In the case of The Glennavis, 69 Fed., 472, 476, the same conclusion was reached by Judge Butler on full consideration; and I have nothing further to add to what has already been said in this court in previous cases. The Brantford City, 29 Fed., 373, 396; The Hugo, 57 Fed., 403–11; The Etona, 64 Fed., 880; The Guildhall, 58 Fed., 796; The Energia, 56 Fed., 124, 127; affirmed 13 C. C. A., 653; 66 Fed., 604; see The Iowa, 50 Fed., 561.

67 Decree for the libellant, with reference to compute the damages.

Dated, New York, October 15, 1896.

At a stated term of the district court of the United States for the southern district of New York, held at the court-rooms in the U. S. post-office building, in the city of New York, on the 5th day of December, 1896.

Present: Hon. Addison Brown, district judge.

BOTANY WORSTED MILLS, Libellant,
vs.
JAMES KNOTT, Respondent.

This cause having been heard upon the pleadings and proofs and having been argued by the advocates for the respective parties, and due deliberation having been had, on motion of Black & Kneeland, proctors for the libellant, it is—

Ordered, adjudged and decreed that the libellant recover against the respondent the amount of the damages sustained by it by reason of the matters alleged in the libel herein and the amount of said damages having been fixed by consent at the sum of $1,049.31, it is—

Ordered, adjudged and decreed that the libellant, The Botany Worsted Mills, recover against the respondent, James Knott, said sum of $1,049.31, with interest from the 30th day of March, 1895, amounting to $105.80, together with its cost taxed at the sum
68 of $36.43, and amounting in all to the sum of $1,191.54.

And it is further ordered, that unless an appeal be taken from this decree within the time limited by the rules and practice of this court, the stipulators for costs and value on behalf of the re-

spondent cause the engagements of their respective stipulations to be performed or show cause within four days after the expiration of said time to appeal or on the first day of jurisdiction thereafter why execution should not issue against their goods, chattels and lands for the amount of their stipulations.

It is further ordered, that unless an appeal be taken from this decree as aforesaid, the clerk of this court pay to the libellant or its proctors the sum of $100 deposited by libellant in the registry in lieu of the stipulation for libellant's costs.

(S'g'd) ADDISON BROWN.

(Endorsed:) Final decree. Filed Dec. 5, 1896.

69 United States District Court, Southern District of New York.

BOTANY WORSTED MILLS, Libellant,
vs.
JAMES KNOTT, Respondent.

SIRS: Please to take notice that the respondent appeals to the United States circuit court of appeals for the second judicial circuit, from the final decree made and entered herein and filed in the office of the clerk of the United States district court for the southern district of New York, on the 5th day of December, 1896.

Dated New York, December 7, 1896.

Yours, etc., CONVERS & KIRLIN,
Proctors for Respondent.

To Messrs. Black & Kneeland, proctors for libellant; Samuel H. Lyman, Esq., clerk.

(Endorsed:) Notice of appeal. Filed Dec. 7, 1896.

70 United States Circuit Court of Appeals for the Second Circuit.

BOTANY WORSTED MILLS, Libellant, Appellee,
vs.
JAMES KNOTT, Respondent, Appellant.

The respondent assigns error to the final decision of the district court herein, as follows:

1st. For that the court held that since the damage to the bales of wool arose through negligence in the particular mode of stowing and changing the loading of the cargo, as the primary cause, although that cause became operative through its effect on the trim of the ship, such negligence in loading and trimming the vessel fell within the first section of the Harter act, and that the third section was inapplicable.

2nd. For that the court held that the ship and owner must answer for the damage to the bales of wool by contact with the sugar, due to the improper trim of the vessel, and that the third section

of the Harter act was inapplicable, and did not exempt the vessel and owner from responsibility for the damage.

3rd. For that the court held that the change of trim at Para was not a fault or error "in the management of the vessel," within the third section of the Harter act.

4th. For that the court omitted to hold that the owners of said vessel used due diligence to make her seaworthy and have her properly manned, outfitted and equipped for the voyage, and that the loss and damage here sued for resulted from a fault or
71 error in the management or navigation of said vessel, within the third section of the Harter act.

5th. For that the court held that the exception in the bill of lading, "damage by stowage, leakage, etc., though caused by the negligence of the master, etc.," was void and did not exempt the vessel and owner from responsibility for the damage to the wool.

6th. For that the court held that the stipulation in the bill of lading, that the contract should be governed by the English law, could not be sustained or applied, and that the contract was not to be construed by such law.

7th. For that the court omitted to hold that the loss and damage here sued for were within the exceptions of the bill of lading pleaded in the answer, and that the said exceptions were valid and enforceable.

6th. For that the court did not dismiss the libel herein, with costs.

CONVERS & KIRLIN,
Proctors for Respondent, Appellant.

(Endorsed:) Assignment of error. Filed Dec. 26, 1896.

72 At a stated term of the district court of the United States for the southern district of New York, held at the court-rooms thereof in the city of New York, on the 31st day of October, 1896.

Present: Hon. Addison Brown, district judge.

HENRY P. WINTER and Others
against
JAMES KNOTT.

This cause having come regularly on to be heard and having been submitted upon the pleadings, proceedings and proofs, and after hearing arguments of the proctors for the respective parties, and due deliberation having been had in the premises, and the amount of the libellants' damages having been agreed upon by and between the parties without reference, now, upon motion of Butler, Notman, Joline & Mynderse, proctors for the libellants, it is

Ordered, adjudged and decreed, that the libellants recover of the respondent the sum of three hundred and forty-five dollars and forty-eight cents ($345.48), the amount of their damages as agreed upon, together with interest thereon from the 15th day of May, 1895, amounting at the date of this decree to the further sum of

thirty dollars and thirteen cents ($30.13), together with their costs as taxed, amounting to the further sum of thirty-six dollars and sixty-three cents making in all the total sum of four hundred and twelve dollars and twenty-four cents; and that they have execution therefor. And it is further ordered, adjudged and decreed that, unless an appeal be taken from this decree within the time and in the manner prescribed by the rules and practice of this court, or this decree be sooner satisfied, then the stipulators upon
73 the stipulations for costs and for value given by the respondent show cause, within four days thereafter why execution should not issue against them, their goods, chattels and lands.

ADDISON BROWN.

Damages agreed to as above and notice of settlement waived.

CONVERS & KIRLIN,
Proctors for Resp'd't.

(Endorsed:) Final decree. Filed Nov. 2, 1896.

United States District Court, Southern District of New York.

HENRY P. WINTER ET AL., Libellants,
vs.
JAMES KNOTT, Respondent.

SIRS: Please take notice that the respondent appeals to the United States circuit court of appeals, for the second judicial circuit, from the final decree made and entered herein and filed in the office of the clerk of the United States district court, for the southern district of New York, on the 31st day of October, 1896.

Dated, New York, November 17, 1896.

Yours, etc.,
CONVERS & KIRLIN,
Proctors for Respondent.

To Messrs. Butler, Notman, Joline & Mynderse, proctors for libellants; Samuel H. Lyman, Esq., clerk.

(Endorsed:) Notice of appeal. Filed Nov. 17, 1896.

74 United States Circuit Court of Appeals for the Second Circuit.

HENRY P. WINTER ET AL., Libellants, Appellees,
vs.
JAMES KNOTT, Respondent, Appellant.

The respondent assigns error to the final decision of the district court herein, as follows:

1st. For the court held that since the damage to the bales of wool arose through negligence in the particular mode of stowing and changing the loading of the cargo, as the primary cause, although that cause became operative through its effect on the trim of the ship, such negligence in loading and trimming the vessel fell within

the first section of the Harter act, and that the third section was inapplicable.

2d. For that the court held that the ship and owner must answer for the damage to the bales of wool by contact with the sugar, due to the improper trim of the vessel, and that the third section of the Harter act was inapplicable, and did not exempt the vessel and owner from responsibility for the damage.

3d. For that the court held that the change of trim at Para was not a fault or error "in the management of the vessel," within the third section of the Harter act.

4th. For that the court omitted to hold that the owners of said vessel used due diligence to make her seaworthy and have her properly manned, outfitted and equipped for the voyage, and that the loss and damage here sued for resulted from a fault or
75 error in the management or navigation of said vessel, within the third section of the Harter act.

5th. For that the court held that the exception in the bill of lading, "damage by stowage, leakage, etc., though caused by the negligence of the master, etc.," was void and did not exempt the vessel and owner from responsibility for damage to the wool.

6th. For that the court held that the stipulation in the bill of lading, that the contract should be governed by the English law, could not be sustained or applied, and that the contract was not to be construed by such law.

7th. For that the court omitted to hold that the loss and damage here sued for were within the exceptions of the bill of lading pleaded in the answer, and that the said exceptions were valid and enforceable.

8th. For that the court did not dismiss the libel herein, with costs.

CONVERS & KIRLIN,
Proctors for Respondent, Appellant.

(Endorsed:) Assignment of errors. Filed Dec. 26, 1896.

76 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

BOTANY WORSTED MILLS, Lib'l't & Appellee,
vs.
JAMES KNOTT, Resp'd't & Appellant.

HENRY P. WINTER and CHARLES F. SMILLIE, Lib'l'ts & Appellees,
vs.
JAMES KNOTT, Resp'd't & Appellant.

I, Samuel H. Lyman, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the foregoing is a correct transcript of the record of the district court in the above-entitled cause, made up pursuant to rule No. 4, in admiralty, of the United States circuit court of appeals, for the second circuit.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern [SEAL.] district of New York, this 18th day of January in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the said United States the one hundred and twenty-first.

SAM'L H. LYMAN, *Clerk.*

77 U. S. Circuit Court of Appeals, Second Circuit.

BOTANY WORSTED MILLS, Appellee,
vs.
KNOTT, Appellant.

Per Curiam:

We agree in this case with the court below that the damage to the wool of the libelant was due not to "fault or error in the management or navigation of the vessel," but to negligence in the loading or stowage of the cargo, and deem it unnecessary to add anything to the observations of Judge Brown upon the point.

A majority of the court also concur in the conclusions of the court below that the exception in the bill of lading for liability for "damage by stowage * * * though caused by the negligence of the master," notwithstanding the provision that the contract should be governed by the law of the flag (English) did not relieve the owner of the steamship, such a stipulation being against the public policy of this country and therefore not enforceable by its courts, and approve the decisions in the Trinacria (42 Fed. Rep., 863); the Glenmavis (69 Fed. Rep., 472); the Iowa (50 Fed. Rep., 561). In this view of the case it is unnecessary to decide whether the prohibitions of the Harter act apply to a bill of lading issued at a foreign port.

The decree is affirmed, with interest and costs.

(Endorsed:) U. S. cir. ct. of appeals, second circuit. Botany Worsted Mills, appellee, *vs.* Knott, appel-ant. *Per curiam.* United States circuit court of appeals, second circuit. Filed
78 Jul- 21, 1897. William Parkin, clerk.

At a stated term of the United States circuit court of appeals for the second circuit, held at the U. S. court-rooms, in the post-office building, in the city of New York, on the — day of June, 1897.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, circuit judges.

BOTANY WORSTED MILLS, Libelant and Appellee,
vs.
JAMES KNOTT, Respondent and Appellant.

This cause having come on to be heard on the appeal of the respondent herein from a final decree of the district court of the United States for the southern district of New York, entered on the 5th day of December, 1896, and having been argued and submitted, and due deliberation having been had,

Now, on motion of Black & Kneeland, proctors for the libelant, appellee, it is

Ordered, that said decree of the said district court be and the same is hereby affirmed, with interest and costs, and that a mandate issue to said district court in the form hereto attached.

E. H. L.

(Endorsed:) U. S. circuit court of appeals, second circuit. Botany Worsted Mills *vs.* James Knott. Order and mandate and
79 notice of settlement. Black & Kneeland, proctors for lib't, 44 Pine street, New York city. United States circuit court of appeals, second circuit. Filed Jun- 1, 1897. William Parkin, clerk.

At a stated term of the United States circuit court of appeals for the second circuit, held in the post-office building, in the city of New York, on the 31st day of July, 1897.

Present: Hon. William J. Wallace, P. J.; E. Henry Lacombe, Nathaniel Shipman, JJ.

HENRY P. WINTERS and Others
against
JAMES KNOTT.

This case having came on to be heard on the appeal of the respondent from a decree in favor of the libelants entered in the office of the clerk of the district court of the United States for the southern district of New York, on the 31st day of October, 1896, and after hearing Mr. Kirlin, of counsel for the respondent and appel-ant, in favor of said appeal, and Mr. Mynderse, of counsel for the libelants and respondents in opposition thereto, and due deliberation having been had, it is, on motion of Butler, Notman, Joline & Mynderse, proctors for libelants,

Ordered that said decree be and the same hereby is in all respects affirmed, and it is further

Ordered that a mandate issue to said district court of the United States for the southern district of New York directing said
80 court to proceed in accordance with the opinion of this court.

W. J. W.
E. H. L.

Approved as to form.

CONVERS & KIRLIN,
Proctors for App'ts.

(Endorsed:) U. S. circuit ct. of appeals for the second circuit. Henry P. Winter and others against James Knott. Order. Butler, Notman, Joline & Mynderse, proctors for libelants & respondents, 54 Wall street, New York city. United States circuit court of appeals, second circuit. Filed July 31, 1897. William Parkin, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing

pages, numbered from 1 to 80 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cases of Botany Worsted Mills, libelant, appellee, against James Knott, respondent, appellant, and Henry P. Winter and others, libelants, appellees, against James Knott, respondent, appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 13th day of November, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the said United States the one hundred and twenty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

Endorsed on cover: Case No. 16,720. U. S. circuit court of appeals, 2d circuit. Term No., 194. James Knott, petitioner, *vs.* Botany Worsted Mills and Henry P. Winter & Charles F. Smillie. Filed November 15th, 1897.

81 United States Circuit Court of Appeals for the Second Circuit.

BOTANY WORSTED MILLS, Libellant, Appellee,
against
JAMES KNOTT, Respondent, Appellant.

HENRY P. WINTER and CHARLES F. SMILLEY, Libellants, Appellees,
against
JAMES KNOTT, Respondent, Appellant.

It is hereby stipulated and agreed that the certified copy of the transcript of the record in the circuit court of appeals, filed with the application for the writ of certiorari herein and now on file in the office of the clerk of the Supreme Court of the United States, be taken and used as the return to the writ of certiorari issued herein by the Supreme Court of the United States December 7, 1897, with the following amendment, to be added at the end of the opinion of the circuit court of appeals (Rec., p. 77), namely: "Lacombe, C. J., concurs in result."

It is further stipulated that the clerk may attach this stipulation to the writ as his return hereto.

New York, December 22, 1897.

BLACK & KNEELAND,
Proctors for Botany Worsted Mills.
BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Winter and Smilley.
CONVERS & KIRLIN,
Proctors for James Knott.

A copy.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

82 To the honorable the Supreme Court of the United States:

The record and all proceedings of the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a certified copy of the stipulation of counsel is annexed hereto, and under direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, December 24, 1897.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

83 [Endorsed:] United States circuit court of appeals, second circuit. Botany Worsted Mills *vs.* James Knott. Henry P. Winter *et al. vs.* Same. Return to writ of certiorari.

84 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you suits in which James Knott is appellant and Botany Worsted Mills is appellee and James Knott is appellant and Henry P. Winters and Charles F. Smillie are appellees, which suits were removed into the said circuit court of appeals by virtue of appeals from the *the* district court of the United States for the southern district of New York, and we being willing for certain reasons that the said causes and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme
85 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceeedings in said causes so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the seventh day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

86 [Endorsed:] Case No. 16,720. Supreme Court of the United States. No. 194, October term, 1898. James Knott *vs.* Botany Worsted Mills & Henry P. Winter *et al.* Writ of certiorari and return.

[Stamped:] Office Supreme Court U. S. Filed Dec. 27, 1897. James H. McKenney, clerk.

No. 632

No. Sept. Term, 1894.

507

Brief of Kirlin for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894

Filed Nov. 15, 1894.

IN THE MATTER OF THE PETITION OF JAMES KNOTT FOR WRITS OF CERTIORARI IN THE CASES

of

BOTANY WORSTED MILLS
Libelant-Appellee

vs.

JAMES KNOTT
Respondent-Appellant

HENRY P. WINTER AND OTHERS
Libelants-Appellees

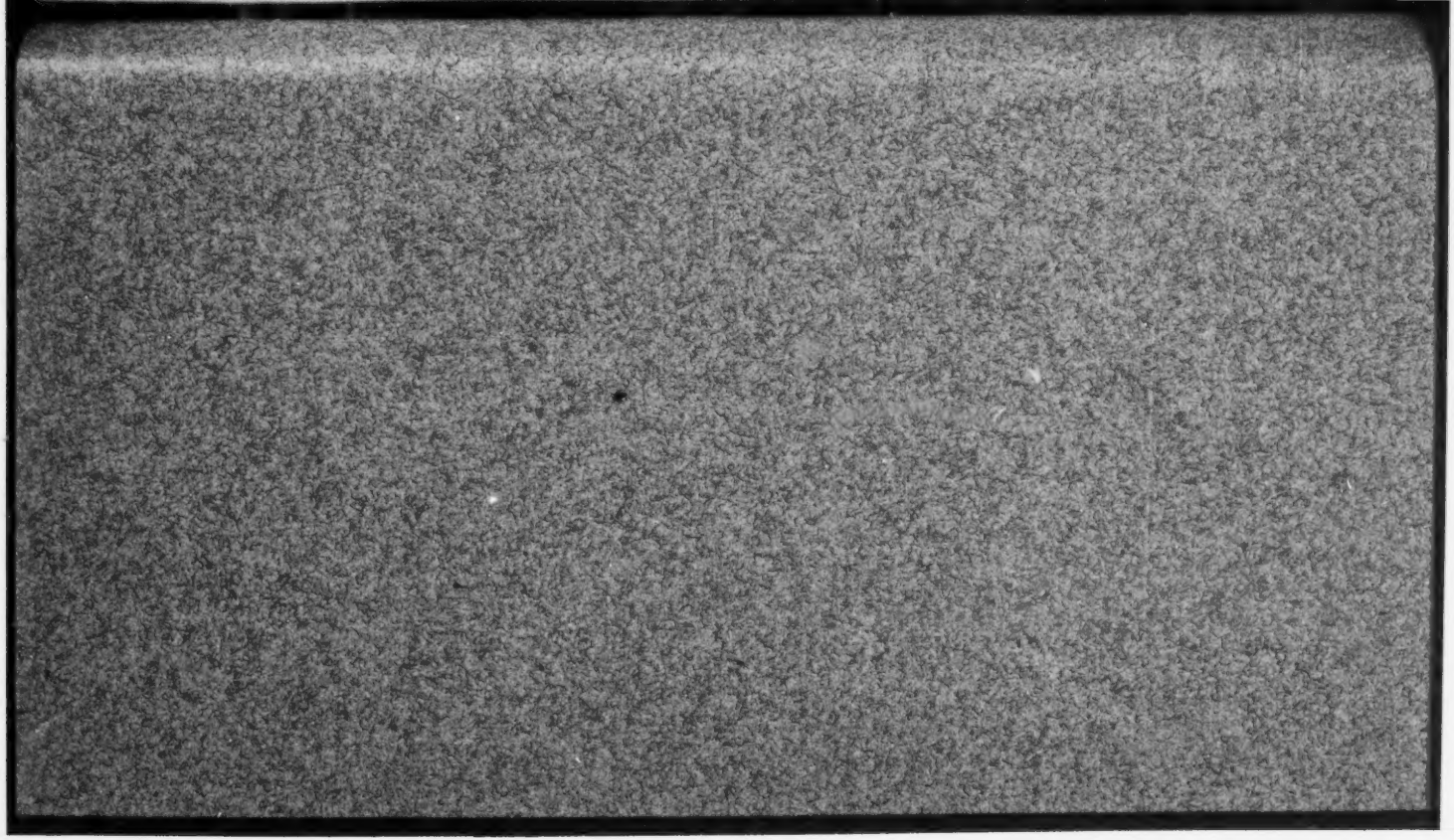
vs.

JAMES KNOTT
Respondent-Appellant

PETITION FOR WRITS OF CERTIORARI

CONVERS & KIRLIN
Proctors for Petitioner

J. PARKER KIRLIN
Of Counsel



Supreme Court of the United States.

BOTANY WORSTED MILLS,
Libelant-Appellee,
vs.
JAMES KNOTT,
Respondent-Appellant.
No.

HENRY P. WINTER and another,
Libelants-Appellees,
vs.
JAMES KNOTT,
Respondent-Appellant.
No.

Please take notice that upon the annexed petition an application will be made to the Supreme Court of the United States, at the opening of court, on Monday, November 15, 1897, or as soon thereafter as counsel can be heard, for writs of *certiorari* herein.

Dated New York, November 11, 1897.

Yours, &c.,

CONVERS & KIRLIN,
Proctors for James Knott, Petitioner.

To Messrs. BLACK & KNEELAND,
Proctors for Botany Worsted Mills.

Messrs. BUTLER, NOTMAN, JOLINE & MYNDERSE
Proctors for Winter and another.

4 SUPREME COURT OF THE UNITED STATES.

BOTANY WORSTED MILLS,
Libelant-Appellee,

vs.

JAMES KNOTT,
Respondent-Appellant.

HENRY P. WINTER and another,
Libelants-Appellees,

5 vs.

JAMES KNOTT,
Respondent-Appellant.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT.

The petition of James Knott, respondent below, respectfully shows unto the Court as follows:

(1.) These were libels *in personam*, filed in the District Court of the United States for the Southern District of New York, to recover damages for injury to certain bales of wool, whilst on a voyage from
6 Buenos Ayres, Argentine Republic, to New York, in respondent's steamer *Portuguese Prince*. The voyage was begun December 21, 1894, and ended about March 30, 1895.

(2.) The wool which was shipped at Buenos Ayres was put in the forward or No. 1 between-deck of the vessel, a proper place, and was properly stowed (Rec., fols. 107, 110, 131, 132), not only with regard to itself, but also with regard to other cargo there laden.

(3.) The bill of lading issued for the wool accorded 7
a privilege to the steamer to trade at intermediate ports—

"With liberty * * * to call at any port or ports in or out of the customary route" (between Buenos Ayres and New York) "in any order, to receive and discharge * * * cargo * * * and for any other purpose whatever; and with liberty to carry goods, or horses, cattle, sheep, or other live animals, on deck or elsewhere, in the said ship, and to carry goods of all kinds, dangerous or otherwise" (fols. 24, 49).

(4.) Pursuant to this liberty, the vessel stopped at a number of ports, loading and discharging cargo. 8
At Pernambuco a consignment of wet sugar was taken. So much of this as there was room for was stowed in one of the lower holds; the rest (about 200 tons, fol. 108), was stowed in the after part of No. 2 between-deck, also a proper place, and was properly stowed, both with regard to itself and to the other cargo in the between-decks (fols. 108–110, 131–132). The sugar did not fill the No. 2 between-deck completely. A space remained between the forward end of the tiers of sugar and the wooden partition that separated the No. 2 from the No. 1 between-deck, of about 25 feet, in which there was no cargo (fol. 108).

The sugar was dunnaged off the deck with three-inch planks (fols. 108–110, 131, 132), to prevent any 9
accumulation of the drainage from the bags, which flowed off into the bilges below by means of two two and a half inch scupper pipes located in the after corners of the No. 2 between-decks (fols. 116–120).

There were also two more scupper pipes on opposite sides of this deck, near the wooden partition between No. 1 and No. 2 (fol. 118), but until the next port of call was reached, the sugar drainage passed off through the after scuppers (fol. 167).

(5.) With the cargo thus stowed, the ship, trimmed by the stern (fol. 100), proceeded towards Para, her

10 next port of call. She was seven days on the passage (pp. 46–51). It was agreed by stipulation between the parties that the wool was not damaged during this part of the voyage, but, on the contrary, was sound on arrival at that port (Rec., p. 42).

(6.) At Para some changes in the loading occurred, but the ship was so managed in these operations as to be trimmed two feet by the head (fol. 171) on leaving that port for Port of Spain, Trinidad, her next port of call (fols. 100, 102, 181-216). She was six days on this passage (pp. 54–59), and on arrival there it was found that the sugar drainage had flowed forward, instead of aft, owing to the im-
11 proper trim of the vessel by the head during this part of the passage, and that some part of it had passed the forward scuppers, had overflowed the dunnage under the wool and had caused heavy damage to the wool (p. 42).

(8.) At Port of Spain, the ship was again trimmed by the stern and no further damage to the wool ensued during the remainder of the voyage (p. 42).

(9.) It thus appears, (*a*) that the wool was properly placed and stowed at Buenos Ayres; (*b*) that the sugar was properly placed and stowed at Pernam-
12 buco; (*c*) that the wool went in safety from Pernambuco to Para, the ship being then in proper trim; (*d*) that sugar drainage damaged the wool while she was in improper trim between Para and Port of Spain; (*e*) that there was no further damage after the trim was again put right in Port of Spain.

(10.) Against the libelants' claims, which arose under the circumstances stated, the respondent invoked the third section of the Harter Act and the following exceptions contained in the bill of lading issued at Buenos Ayres:

"To be delivered in the like good order and condition at the aforesaid port of New York * * * negligence of master or mariners * * * and all damage arising from the goods by stowage, or contact with, or by sweating, leakage, smell, or evaporation from them * * * however caused or otherwise howsoever * * * or any other peril of the seas, rivers, navigation * * * of whatever nature or kind, and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom be occasioned by the wrongful act, default, negligence, or error in judgment of the owners, masters, officers, mariners, crew, stevedores, engineers, and other persons whomsoever in the service of the ship, whether employed on the said steamer or otherwise, and whether before or after, or during the voyage, or for whose acts the shipowner would otherwise be liable, or by unseaworthiness of the ship at the beginning, or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness * * * excepted." "Weight and condition of contents unknown."

"*This contract shall be governed by the law of the flag of the ship carrying the goods.*"

It was admitted that the exceptions were valid under British law, which was the law of this ship's flag (fol. 50).

(10.) The District Judge found after "no little embarrassment" (fol. 247), that the loss was due to improper stowage, but notwithstanding that the contract was made abroad between a foreign shipper, and a foreign master, and was valid by the law in view of which they contracted, refused to uphold or give force to the exceptions, for the stated reason that they were opposed to our public policy (p. 66), which was apparently considered material because the bill of lading was sued on by an American assignee. The result was

16 decrees for libelants. There was other damage besides that involved in these suits.

(11.) On appeal by respondent, the decree was affirmed practically on Judge Brown's opinion (Rec., p. 77), but not unanimously. It is to be inferred from the memorandum opinion that one of the Circuit Judges was of opinion that the contract, made abroad between foreigners and expressly stipulating for the law of the ship's flag, should have been upheld. The entry of final decrees on mandate has been stayed to admit of this application being made.

17 (12.) The question whether a contract made abroad, between foreigners, expressly stipulating for the law of the flag, should be upheld in the courts of this country, is one constantly recurring, and is of deep importance to shipowners. The clause is now in common and extensive use, for the purpose, as this petitioner is advised, of providing for harmony and uniformity in the determination of the mutual rights and liabilities of ship and cargo at any stage, or at different stages of the voyage. Without such a clause, a great variety of different laws, as your petitioner is advised, would be liable to be applied. If libelants had sued, as they might have done, in Port of Spain, and the flag clause had not
18 been in the contract, the law of the flag would probably have been applied as that which the parties presumptively intended to control their rights (*Re Missouri*, 42 *Chan. Div.*, 321).

If some accident had occurred after shipment in Buenos Ayres or at a Brazilian port, the *lex loci contractus* would presumably have been applied. If a disaster had occurred *en route*, making it necessary to put into a port of refuge, say at the Danish possession of St. Thomas, the master's powers and duties in regard to bottomry, or transshipment, would presumably have been determinable by the

law of the flag, in the absence of an express stipula- 19
tion.

Pope v. *Nickerson*, 3 *Story*, 465, 484-5.
Lloyd v. *Guibert*, *L. R.*, 1 *Q. B.*, 115.
The Karnack, *L. R.*, 2 *P. C.*, 505, 512.
The Gaetano and Maria, 7 *P. D.*, 137.
Liverpool v. *Phenix Ins. Co.*, 129 *U. S.*, *at p.* 449.

In case of damage to the cargo in a British port, by collision with another British vessel, while in charge of a compulsory pilot, the cargo's rights would be subject to English law.

Smith v. *Coudry*, 1 *How.*, 23.
The Scotland, 105 *U. S.*, 24, 29. 20
The Belgenland, 114 *U. S.*, 355, 370.

In case of a collision with a German vessel in a Brazilian port, the rights of cargo, as against the carrying vessel, would probably be governed by the local law as to pilotage defenses, and by that or the *lex loci* as to other defenses or claims. Many other possible cases can be supposed in which different foreign laws might be applied in the absence of a specific provision for the law of the flag. Without such a clause, as your petitioner is advised, he can never know by what law his rights or liabilities or those of his vessels plying in the South American Line, and in other lines, are to be ad- 21
judged; nor can the shippers of cargoes by his vessels. With the flag clause in his contracts he can obtain advice as to his rights at home, in whatever part of the world his vessels (of which he is part owner and manager of forty-two) may fall in trouble.

(13). This petitioner is advised that the effect of the flag clause has been argued in this Court recently in the case of The *Plymothian* and The *Victory*, Nos. 66 and 67 of this present term.

22 (14.) It is also important that this Court should determine if the operation of the Harter Act is not excluded by the stipulation for foreign law, whether the prohibitions contained in Sections 1 and 2 of that Act are operative upon contracts made abroad, or abrogate the freedom of contract permitted by the foreign law of the place of the contract, or of the particular law selected.

(15.) Your petitioner presents herewith a certified copy of the transcript of record returned from the District Court to the United States Circuit Court of Appeals and of the record in the last named court, as well as a copy of his brief in said Court.

23 Wherefore, your petitioner prays that this Honorable Court will cause writs of *certiorari* to be issued in the foregoing entitled cases pursuant to the power vested in this court by the Act of Congress entitled "An Act to Establish Circuit Courts of Appeals," &c., approved March 3, 1891, requiring the said United States Circuit Court of Appeals for the Second Circuit to certify the whole record and cause to this Court for consideration, and that thereupon this Court will decide the matter in controversy in the same manner as though the cause had been brought to this Court for review by appeal; and your petitioner will ever pray, &c.

JAMES KNOTT,

24 By CONVERS & KIRLIN,
His Proctors.

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss.:

HERBERT BERNARD SAUNDERS, being duly sworn, says: That he is superintendent at the port of New York for the petitioner, James Knott, who resides at Newcastle, England, and is now absent from the District; that he has personal knowledge as to many of the matters stated in the foregoing petition from his examination of the ship and cargo upon her

arrival in New York at the conclusion of the voyage; 25
that he has read the foregoing petition, and that the matters therein stated are true of his own knowledge, except such as occurred upon the voyage, and that he is informed and believes that such matters are true, the basis of his information and belief being statements made to him by the officers of the vessel and the evidence adduced at the trial of the cause.

H. B. SAUNDERS.

Sworn to before me this 12th day of November, 1897.

FREDERICK GREEN,
[SEAL.] Notary Public,
New York County. 26

I HEREBY CERTIFY that the foregoing petition is presented in good faith, and not for the purpose of delay, and that, in my opinion, the case is a proper one for granting the relief prayed for.

J. PARKER KIRLIN,
Of Counsel for Petitioner.

United States Circuit Court of Appeals,

FOR THE SECOND CIRCUIT.

BOTANY WORSTED MILLS,
Libelant, Appellee,

vs.

JAMES KNOTT,
Respondent, Appellant.

HENRY P. WINTER and another,
Libelants, Appellees,

vs.

JAMES KNOTT,
Respondent, Appellant.

BRIEF FOR APPELLANT.

Statement.

These are appeals from decrees for $1,191.54 and for $412.24 entered against the respondent, as owner of the steamship *Portuguese Prince*, in an action brought in the District Court of the United States, for the Southern District of New York, by the owners of wool shipped upon the said steamship, for damage from contact with drainage from sugar.

The wool was shipped at Buenos Ayres for New York, was stowed in the forward part of No. 1 between-decks,

and extended aft to within about ten feet of a temporary wooden partition, which separated No. 1 from No. 2 between-decks (fol. 107). The sugar was shipped at Pernambuco, a port of intermediate call, and was stowed in No. 2 between-decks, the forward part of the sugar being about twenty-five feet aft of the wooden bulkhead (fol. 108). The bulkhead was not tight, and was not intended to be so, but ample means was provided for the escape of the sugar drainage by scuppers in the after part of between-decks No. 2, as well as by scuppers in between-decks No. 1 (fols. 116–120). Both the wool and the sugar were properly stowed and dunnaged (fols. 108–10, 131–2). On leaving Pernambuco, the ship was trimmed by the stern (fol. 100). At Para, the next port of call, discharge of cargo from the after holds altered the trim of the vessel, so as to put her two feet by the head; and she continued two feet by the head until she arrived at Port of Spain, Trinidad, where cargo was loaded into the after hold, which brought her again by the stern (fols. 100, 102, 181–216). In the meantime, in consequence of the vessel's improper trim, drainage from the sugar had run forward and injured the wool (fols. 115–16).

Though the learned District Judge speaks, in his opinion, of "changes in loading" at Para, no cargo was loaded there, nor was there any change in loading, except the discharge of cargo destined for that port (fols. 208–12). It was stipulated between the parties as follows (fols. 167–8):

"There was no damage to the wool from sugar drainage until the ship was trimmed by the head at Para, as shown in the official log, which is offered in evidence. It was damaged by sugar drainage finding its way through the bulkhead and reaching the wool, at Para, or between Para and Port of Spain. After the ship was again trimmed by the stern at Port of Spain, none of the drainage from the sugar found its way into the forward 'tween-decks. The Court may draw inferences" (fs. 167–8).

The bills of lading contained clauses of exemption from—

"negligence of master or mariners * * * and all damage arising from the goods by stowage, or contact with, or by sweating, leakage, smell or evaporation from

them * * * however caused, * * * and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom be occasioned by the wrongful act, default, negligence, or error in judgment, of the owners, masters, officers, mariners, crew, stevedores, engineers, and other persons whomsoever in the service of the ship, whether employed on the said steamer or otherwise, and whether before, or after, or during the voyage, or for whose acts the shipowner would otherwise be liable, or by unseaworthiness of the ship at the beginning or at any period of the voyage, provided all reasonable means have been taken to provide against unseaworthiness;"

and further provided that the contract should be governed by the law of the flag of the ship carrying the goods (Exhibits B and C). The *Portuguese Prince* was a British ship.

The answers pleaded that the damage was due to a fault or error in navigation or in the management of the vessel, for which the vessel was freed from liability by section three of the Harter Act; they also pleaded the exemptions in the bills of lading from loss by negligence, and that such exemptions are valid by English law.

POINTS.

I.

THE DAMAGE WAS CAUSED BY A FAULT OR ERROR IN NAVIGATION OR IN THE MANAGEMENT OF THE VESSEL, WITHIN THE MEANING OF THE HARTER ACT, AND THE VESSEL IS CONSEQUENTLY NOT LIABLE.

(*a.*) *The cause of the damage was the negligence of the master in permitting the vessel to take and keep an improper trim.*

There was no negligence in the manner of stowing the wool at Buenos Ayres, or in stowing the sugar at Pernambuco, considered either separately or with reference to each other. So long as the vessel re-

tained her proper trim, no damage could occur, and the master might reasonably have expected her to retain it throughout the voyage. There is no intimation in the evidence or in the opinion of the trial Judge, that when the sugar was stowed at Pernambuco there was ground to expect that the ship would lose her trim, in subsequently discharging, or at any other time; nor that, if a change of trim was threatened, there would not be abundant opportunity to prevent it. There was, therefore, no negligence until, at Para, the ship was permitted to become and to remain by the head. Before that time the stowage of the sugar and wool had been completed.

Therefore there was no fault in the stowage of the cargo. Nor was there fault in the discharge of cargo at Para. It was necessary, and was of course, expected that the cargo consigned to Para should be taken out at that port, and it was taken out, for all that appears, in an entirely proper manner as far as concerns the discharge itself. The change of trim was not a necessary consequence of the discharge, for it could obviously have been avoided by changes in water ballast or by shifting cargo. It was the master's duty, as the trial Judge expressed it, to take care "that no changes of loading should bring the ship down by the head." He failed in that duty, with the result that the ship was put into a condition dangerous to the cargo she had on board.

(*b.*) *The failure properly to regulate the trim was not a fault in stowage.*

It would seem that the learned District Judge was of opinion that since the manner in which the vessel was originally stowed, furnished the reason why she ought not to be allowed to get by the head, the maintenance of her trim in a subsequent *discharge of cargo* (which he called a change in loading), became a part of her stowage, and that a faulty trim related back and partook of the nature of a fault in stowage.

He said (fol. 248) that "the wool should not have been stowed forward of the wet sugar, unless care was taken

in the other loading, and in all subsequent changes in the loading to see that the ship should not get down by the head," and (fol. 249) that "The negligence consisted *in stowing the wool far forward*, without taking care *subsequently* that no changes of loading should bring the ship down by the head."

It can hardly have been intended to intimate that that which was not want of prudence at the time of stowing the wool, could become such afterward by virtue of later occurrences.

On the other hand, if the real negligence occurred at a subsequent period of the voyage, such negligence, it is submitted, cannot be transformed into a lack of care in stowage upon the theory that it was the manner of stowage which made necessary the subsequent preservation of trim. The law distinguishes only between stowage which is proper and stowage which is not proper. If the cargo was originally stowed in a proper manner, that is to say, if as it was originally stowed, there was no reasonable ground to apprehend damage, it can make no difference whether it was stowed in one particular way or in another. The subsequent damage has no legal relation to the method of stowage adopted. In other words, so long as there was no reasonable ground to anticipate a change in the vessel's trim sufficient to damage the cargo, it can make no difference what amount or degree of change in the trim would be necessary to produce damage, nor in what proximity or relation to other cargo the wool was stowed. The case would be the same as if the wool were stowed in a compartment by itself, and could not be damaged unless the ship heeled over far enough to bring water down her hatches. If such a vessel were permitted to capsize while discharging by taking out all the cargo on one side first, it would seem that the Court must say, if consistent, that the stowage was negligent, and that the negligence consisted in stowing the wool in the most suitable place in the vessel without taking care subsequently that the ship should not tip over.

Indeed, if wool in a forward hold were injured by collision, due to a wrong order given to the helm, would not

the same logic prove that to be a fault "in stowing the wool far forward without taking care subsequently" that collision should not occur? The question in both cases must be whether the injury might have been anticipated from the stowage; if not, the fault is not in stowage, but in a subsequent and different lack of care.

(c.) *A negligent alteration of a vessel's trim, though occurring during the discharge of cargo, is a fault of management within the Harter Act.*

It has been argued that the clause of the Harter Act exempting the shipowner for faults in management must receive a restricted construction, so as not to conflict with the more particular provisions of those clauses which forbid the insertion of agreements in bills of lading, relieving (that is, purporting to relieve) shipowners from liability for faults such as negligent stowage and delivery. It is conceived, however, that if there is any conflict, the exemption of faults in management, which is explicit, must prevail over the other clauses which bear on the shipowner's liability only by inference. They do not say what his liability is; they only declare that such liability as he has, he shall not diminish. The third section fixes the liability and is dominant. It declares, in substance, that where the shipowner having taken all care to provide a proper ship and a proper crew, is not personally at fault, he shall not be made responsible for the dereliction in duty of those to whom he has necessarily and properly committed the management and navigation of his vessel. Unless the damage can be fastened on the person whose act has caused it, it must lie where it falls. The other clauses do not cut this provision down. They may give rise to an inference that stowage and loading *in general* are not included within the management of the ship; but nothing more.

For loss arising from mere accident, the act allows the shipowner to relieve himself by agreement as he sees fit. For loss arising from negligence of his agents, the act fixes his liability. It is believed to have been the intent of Congress to absolve the shipowner from liability

for failure of his officers or crew in seamanship; that is to say, for failure to do properly whatever would fall within the scope of their duties as seamen in the course of an ordinary voyage, from the time the cargo was stowed on board until it was ready for delivery at its port of destination. This would include a regulation of the speed and trim of the vessel, as well as the use of any of her appliances in the ordinary course of the voyage. It would, perhaps, not include theft or careless loss of cargo on the voyage, as those are not faults in seamanship.

In *The Glenlochil* (1896), Prob., 10, it became necessary during the discharge of the defendant's cargo at the port of destination to stiffen the ship, and for this purpose water was run into a ballast-tank, and because of the damaged condition of a sounding-pipe and its casing due to heavy weather on the voyage, that part of defendant's cargo still in the hold was damaged, the omission to ascertain the condition of the sounding-pipe being negligence. The bills of lading incorporated by reference the provisions of the Harter Act. It was *held* that the word "management" extended to operations, during discharge at the port of destination as well as at sea, and that the stiffening of the ship by means of the ballast-tank was an act of management.

In *The Ferro* (1893), Prob., 38, where a bill of lading contained an exemption for loss from any act, neglect or default "in the management or navigation of the ship," and it was held that stowage without sufficient dunnage was not within the exemption, Sir FRANCIS JEUNE said at page 45:

"It is not difficult to understand why the word 'management' was introduced, because inasmuch as navigation is defined as something affecting the safe sailing of the ship in the case I have referred to, it is easy to see that there might be things which it would be important to guard against connected with the ship itself, and the safe management of the ship, which would not fall under navigation. Removal of the hatches for the sake of ventilation for example might be management of the ship, but would have nothing to do with the navigation."

In *The Glenlochil, supra*, the same learned Judge said, at page 16:

"It may be that the illustration I gave in that case (*The Ferro*) as to the removal of the hatches for the sake of ventilation was not a very happy one, but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo, and want of care of vessel, *indirectly affecting the cargo.*"

In *Dobell & Co.* v. *S. S. Rossmore Co.* (1895), 2 Q. B. 408, A. L. SMITH, *L. J.*, said, at page 47:

"It is not necessary to decide what is the interpretation of the expression 'faults or errors in navigation or in the management of the vessel.' I may say, however, that I think that the meaning of the section is that if the shipowner by himself or his agents uses due diligence to make the ship seaworthy, when she starts, he shall not be liable for what happens afterwards when the ship is at sea, and he has no more control over her."

It seems clear that there may be acts constituting management of the vessel in port as well as at sea, as was decided in the case of *The Glenlochil* (*sup.*), and that for such acts of management as are under the control and form a part of the duty of the officers of the vessel it is the intention of Congress that the owner shall not be liable. The preservation of a vessel's trim is a part of the duty of her master in respect to his care and oversight of the vessel, and constitutes a part of her management.

In *Lawrence* v. *Minturn*, 17 How., 100, Mr. Justice CURTIS said:

"As the quantity of lading and the consequent *trim* and seaworthiness of a vessel are matters as to which the master is, generally speaking, bound to exercise his skill, and over which he is intrusted for the benefit of all concerned with a supervision, his failure to do so properly is negligence for which the owner may be liable."

For that reason it was considered that under an allegation of carelessness of the master a cargo owner might show overloading of the vessel.

If the change of trim had been designedly produced by filling ballast tanks, to steady the ship, it is submitted that the appellant would not have been liable for resulting damage to the wool. If so, a negligent omission to steady the ship by means of the ballast tanks would equally have been a fault of management, and the owners would not have been liable for damage to cargo due to the vessel's lack of stability.

For the reasons following, it can make no difference that the omission was to trim the ship *for the benefit of cargo*, or whether she should have been trimmed by using ballast-tanks or by shifting cargo.

(*d.*) *Whether an act or omission constitutes a fault in management depends on the nature of the thing done or omitted, and not on the purpose of the man who does it, or the means he takes to accomplish it.*

The District Judge distinguished the case of *The Glenlochil* (*sup.*) upon the grounds (1) that the act done was primarily for the benefit of the ship and not of the cargo; and (2) that it was done with ship's appliances. It would seem, however, that that case should not and would not have been differently decided if the purpose of filling the tank had been to benefit the cargo by bringing the ship down nearer to the wharf, so as to facilitate the discharge, as in *The Glenmavis*, 69 Fed. Rep., 472. In either case, the primary effect of the act would be upon the ship, and it would affect cargo only through affecting the ship. If a change in the ship designed for the ship's benefit is management of the ship, it must equally be management, though designed for the benefit of the cargo.

It is difficult to see what object the framers of the Harter Act could have had in providing that the owner of a vessel should be liable for the negligent manner in which a master filled a ballast-tank, provided he intended to benefit the cargo by it, and not liable, if he did it intending to benefit the vessel; or what the rule of liability should be if it were intended both to stiffen the vessel and to bring her down in the water, so that cargo could be delivered to the wharf from a lesser elevation.

The whole voyage and everything done in the prosecution of it is for the benefit of the cargo as much as of the ship. As Sir FRANCIS JEUNE said in *The Glenlochil*, at page 15: "In a secondary, though not in a primary sense, any mismanagement of the ship, in navigation or otherwise, is a want of proper care as regards the cargo."

In *The Silvia*, 64 Fed., 607, neglect to close an iron shutter was held a fault in management, although such neglect endangered only certain cargo and not the ship.

If an alteration of the vessel's trim by means of ballast tanks is an act of management, an alteration effected by any other means, or without the use of the ship's appliances, as by shifting cargo, is an act of management, because it relates to the vessel. And a negligent omission to correct an improper trim, is a fault of management equally whether the trim should have been corrected by using ballast tanks or by shifting cargo, or by any other method whatever.

(e.) *The proximate cause of damage was the improper trim of the vessel.*

If the foregoing remarks are well-founded, it is immaterial to the purposes of this case that the reason why the vessel should not have been permitted to get out of trim was the likelihood of damage to cargo, or that her improper trim was not the result of a misuse of ship's appliances. An improper trim being a fault of management, the question really is, whether such fault caused the damage, or whether the damage may be attributed to some other cause.

Here again, for illustration, recourse may be had to the extreme case supposed above of a vessel so lightened by the discharge of cargo at one side as to admit water at the other. It is the improper trim which directly produces the damage. It may be true that the consequences of the faulty trim might have been avoided by a restowage of cargo, but so in *The Silvia*, the consequences of leaving the port open might have been avoided by taking cargo from the compartment. Even if it had appeared in that case that spreading a tarpaulin over the cargo would have kept

it dry, it is believed that the negligence would still have been considered to lie in the omission to close the port, and it would have been held; *first*, that that omission was negligent, because damage to cargo, though not to ship, was likely to result; and *secondly*, that in a legal sense the negligence consisted in that omission alone, since the necessity for spreading the tarpaulin arose only in consequence of it, and lasted only while the omission to close the port continued. So, in the case at bar, the omission to correct the ship's trim was improper, because of the likelihood of damage to cargo; and even if such damage might have been avoided by immediately shifting and restowing the wool before the sugar drainage had a chance to reach it, the damage to the wool is not to be attributed to any incidental, consequent and contemporaneous failure to protect the wool against the sugar drainage, but solely to the improper trim of the ship by which the injury was directly produced.

II.

IF THE LOSS WAS NOT DUE TO A FAULT IN THE MANAGEMENT OF THE SHIP, THEN THE EXEMPTIONS OF LOSS BY STOWAGE, LEAKAGE, &C., EVEN WHEN CAUSED BY NEGLIGENCE, ARE VALID, AND RELIEVE THE VESSEL.

1. *The prohibitions of the Harter Act against the insertion of clauses in bills of lading containing exemptions of negligence, do not apply to a bill of lading issued at a foreign port.*

The provisions of the Harter Act are set forth in an appendix. They are penal, the insertion of a clause in a bill of lading, coupled with the refusal to issue a bill in the form provided for in Section 4, being made a criminal offense, punishable with a fine not exceeding $2,000. They are, therefore, limited in application to the territorial jurisdiction of Congress.

The act must be so construed as to bring it within the

proper powers of Congress, and it must be held to be confined to bills of lading issued at a port of the United States." That it was the intention of Congress so to confine it, is made clear by the language of the act. The third section exempting the owners for faults in navigation or management, applies to "any vessel transporting merchandise or property *to or from* any port of the United States. In Sections 1 and 4, the word "to" is omitted, and the words are, "any vessel transporting merchandise or property from or between ports of the United States and foreign ports." The omission of the word "to," was evidently for the purpose of confining the operation of the penal sections to bills of lading issued in the United States, for foreign ports or for other United States ports. Even if the act were intended to apply to foreign ports, and to make criminal acts done by foreigners there, it would, in so far, be inoperative, as without the powers conferred upon Congress. If Congress could compel a master to issue a bill of lading without a negligence clause, it could compel him to issue a bill without any exceptions in it at all, or which contained an agreement binding the vessel even for the act of God.

2. *No reason appears why the parties are not entitled to have the Court give effect to their intention.*

(*a.*) The contract evidenced by the bills of lading was made at Buenos Ayres, and was to be performed upon a British vessel. The parties have agreed that it shall be governed by British law, and under the British law they are entitled to have full effect given to the agreement which they have made. That the negligence clause is valid by British law, is admitted in the answers to interrogatories which stand as answers in both cases (fols. 49, 50, 96). That the parties intended the stipulation to be binding is clear, and they have a right to the enforcement of their contract unless some reason of public policy appears to the contrary.

(*b.* There is nothing immoral nor contrary to fair dealing in a stipulation which relieves the shipowner from

the consequences, not of his personal negligence, but of the negligence of subordinates, who are necessarily, as a matter of fact, beyond his personal control. There is no attempt to relieve the shipowner, if he has not exercised due care in the selection or supervision of his employees. The effect of the clause is simply to provide that as between the shipowner and the owner of cargo, loss which was not due to the fault and could not have been avoided by the exertions of either, shall not be shifted from one to the other but shall lie where it falls. The agreement was made upon good consideration. The shipowner has performed his part of it. "It is to be assumed that the cargo owner has received a consideration for it in a reduced rate of freight" (The *Wells City*, 61 Fed. Rep., 857). Consequently there would seem to be the strongest reasons of fair dealing and commercial integrity why the stipulation should be enforced. Is there any predominant reason why it should not be enforced?

(c.) It has been held that such a stipulation, if made with reference to American law, within the United States, and intended to be performed here, would not be enforceable, because contrary to public policy. It is, however, also the law that if made in a foreign country, by whose laws the stipulation was valid, it would be enforced here, at least in regard to negligence which occurred in such foreign country (The Trinacria, 42 Fed. Rep., 863; Baetjer *vs.* La Compagnie Generale Transatlantique, 59 Fed. Rep., 789; The Majestic, 60 Fed. Rep., 624-627; Fonseca *vs.* Cunard S. S. Co., 153 Mass., 553).

It would seem, therefore, that the considerations of public policy which under the circumstances before stated prevent the enforcement of the clause in our courts, are not such as would apply to the contracts wherever made or intended to be performed, but are considerations of purely local policy.

Only contracts invalid because immoral or flagrantly unjust are unenforceable here, though treated as valid where made (Oscanyon *vs.* Winchester Arms Co., 103 U. S., 261).

This exception does not apply to contracts merely op-

posed to some local public policy. Thus in *Commonwealth of Kentucky* v. *Bassford*, 6 Hill, 438, it was held that a contract made and to be performed beyond the State of New York in relation to a foreign lottery, if lawful where made, would be enforced in New York, though if made in New York it would be unlawful (see also *Thatcher* v. *Morris*, 11 New York, 438; per Lord Mansfield, *Robinson* v. *Bland*, 2 Burrows, 1077).

The apparent reason for disregarding negligence clauses in domestic contracts is the belief that the social and economic conditions prevailing here are such that the possible encouragement of negligence among employees, by failure to hold their principals to a strict accountability therefor, would produce results worse than a failure by the courts to hold parties to their bargains.

It may well be, that under the different conditions of foreign countries, the same reasons do not apply with sufficient force to produce the same result of public policy. That they do not so apply, and that the public policy of many, if not most, other countries *requires* such stipulations to be upheld, is proved by the view taken of negligence stipulations in the courts and legislatures of those countries, whose views as to the public policy of their own countries must be taken as conclusive. It is well known that the courts not only of Great Britain, but of other countries, have long enforced negligence clauses, and that their legislatures have acquiesced in such enforcement. GREAT BRITAIN: *In re* Missouri S. S. Co., 42 Ch. D., 321; FRANCE: Baetjer vs. La Compagnie Generale Transatlantique, *supra;* ITALY: The Trinacria, *supra;* HOLLAND: The Guildhall, 58 Fed. Rep., 796; GERMANY: The Glenmavis, 69 Fed. Rep., 472.

(*d.*) The Harter Act, which is the latest expression of legislative opinion on the questions of policy involved, does not forbid the enforcement in our courts of negligence stipulations made in foreign countries, and the cases of The Trinacria, The Majestic, and Baetjer vs. La Compagnie Generale Transatlantique, above cited, show that it is not against, but in accordance with our policy to enforce them. Were it otherwise, the courts must have

refused the ship owner the benefit of the exemption for the same reason that it would have done so had the contract been made and the negligence occurred at New York.

Those cases are also authority for the point on which authority seems superfluous, that there is nothing in such an exemption, immoral or inherently unjust.

(e.) In view of the fact that public policy as to the enforcement of the negligence clause varies in different countries, there can be no presumption that its enforcement is against the public policy either of the Argentine Republic, where the contract was made, or of Brazil, where the negligence occurred. The question is one of fact rather than of law. The presumption is that the parties are entitled to have their contract enforced, and in this case no reason appears to the contrary.

Even if it were shown that in the Argentine Republic and in Brazil the clause was invalid, that would not demonstrate its enforcement to be against our policy. The parties have chosen as their standard, not the Argentine or Brazilian law, but the law of England; and it is hard to see that the enforcement of the clause could conflict with our policy any more than it would if it were made, and the negligence occurred, in England. The fact that a stipulation is void as against the public policy in the place where made, does not render it void (*In re Missouri S. S. Co.*, 42 Ch. D., 321).

In that case, a shipment of cattle was made at Boston, Massachusetts, under a contract made in Boston, which excepted loss by negligence of the master or crew. The vessel was negligently stranded in English waters. The exception of negligence in navigation was void, both by the law of Massachusetts and by the Federal law. The Court of Appeals, affirming CHITTY, *J.*, held, that as the law of the United States did not make the exception illegal but only void, in the sense that the Courts there would disregard it, effect would be given it in England.

(*f.*) Whether or not a negligence clause made in a foreign country relieves the owner for damage occurring there, depends on the law in reference to which the contract is made.

In the case of The Montana, 129 U. S., 397, Mr. Justice GRAY (at p. 458), said:

"This review of the principal cases demonstrates that according to the great preponderance if not the uniform concurrence of authority, the general rule that the nature, the obligation and the interpretion of a contract are to be governed by the law of the place where it is made, *unless the parties at the time of making it have some other law in view*, requires a contract of affreightment made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, *unless the parties, when entering into the contract, manifest a mutual intention that it shall be governed by the law of some other country.*"

In *Fonseca* v. *Cunard S. S. Co.*, 153 Mass., 553, 557, KNOWLTON, *J.*, said:

"The contract being valid in England where it was made, *and the plaintiff's acceptance of it under the circumstances being equivalent to an express assent* to it, and it not being illegal or immoral, it will be enforced here, notwithstanding that a similar contract made in Massachusetts would be held void, as against public policy."

See also *Greenwood* v. *Curtis*, 6 Mass., 358; *The Industrie* [1894], Prob. 58; *Forepaugh* v. *D. L. & W. Ry.*, 128 Penn. State, 217, and cases there cited.

KENT, 2 Comm., 444-5, lays down the rule thus:

"The necessary intercourse of mankind requires that the acts of parties valid where made, should be recognized in other countries, provided they be not contrary to good morals, nor repugnant to the policy and positive institutions of the State."

In *Field's International Code*, which purports simply to codify the law as it is, the rule on this subject is stated (2d Edition, p. 413, Section 603), as follows:

"The law intended by the parties to govern the interpretation of any stipulation of their contract is deemed to be: (1) *The law of any nation named by them for that purpose as a part of their contract;* or (2) If no such law is so named, the law of the place where such stipulation is agreed to be wholly performed; or (3) If no such law or place of performance is specified, the law of the place of making their contract; but in this case a contrary intention may be shown."

The cases cited by Mr. Field support the rule laid down. In *Miller* v. *Heinrick* (4 Campbell, 155), an English court held that a Russian contract for seamen's wages payable monthly "subject to the deductions provided for by the agreement of the Russian Marine" was to be governed in that respect by the law so mentioned. In *Este* v. *Smith* (23 Law Journal Chancery, 705) 18 Beavan, 122, it was stated that English subjects on their marriage may stipulate that their rights shall be regulated by the law of a foreign country; and the courts of England will enforce such a contract. Similar in effect is *Byam* v. *Byam*, 19 Beavan, 58; *Westlake, Private International Law*, Section 371. In *Van Schaick* v. *Edwards*, 2 Johnson's Cases, 367, KENT, *J.*, held that where it was clear the parties had a view to the laws of another State in the execution of the contract, then undoubtedly the contract was to be governed by such foreign law.

The conclusion is, that there is nothing in the public policy of the United States, to prevent the enforcement of a negligence clause in a contract made abroad.

III.

THE DECREES APPEALED FROM SHOULD BE REVERSED WITH COSTS.

New York, April 20, 1897.

Respectfully submitted.

CONVERS & KIRLIN,
Proctors for Appellant.

APPENDIX.

HARTER ACT.

(NOTE.—Italics indicate parts changed by amendments in the passage of the bill).

P. R. 9176.

A BILL relating to contracts of common carriers and to certain obligations, duties and rights in connection with the carriage of property.

Be it enacted, etc., That it shall not be lawful for *any common carrier* or the manager, agent, master or owner of any vessel transporting merchandise or property from or between parts of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care in transport, or proper delivery of any and all lawful merchandise or property committed to its or their charge, *nor shall it be lawful to limit its or their liability to less than a full indemnity to the legal claimant for any loss or damage therefrom, and* any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to* properly equip, man, provision, and outfit said vessel, and make said vessel seaworthy and capable of performing her intended voyage, or *any covenant or agreement* whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and

[PUBLIC—No. 57.]

AN ACT relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to exercise due diligence*, properly equip, man, provision, and outfit said vessel, and *to* make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly

properly deliver same, shall in any wise be lessened, weakened or avoided.

SEC. 3. That if any vessel transporting merchandise or property *between* ports in the United States of America *and foreign ports* shall, *on starting on her voyage, be* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent *or master* shall become or be held responsible for damage or loss resulting from *error of judgment* in navigation or in the management of said vessel, *if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery,* nor shall the owner or owners, *the vessel,* or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies, *or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, agent, manager, or other authorized person to issue to shippers of any lawful merchandise a bill of lading or shipping document stating the marks, packages, or quantity and apparent condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and the voyage, or ports at which such vessel is intended to touch, and such document shall be evidence of the responsibility of the vessel for the merchandise therein described.*

SEC. 5. *That it shall be the duty of the collector of the port in which the vessel is lying to refuse clearance to a vessel from said port if he is informed and is satisfied that the owner, master, agent, commercial carrier, or*

deliver same, shall in any wise be lessened, weakened, or avoided.

SEC. 3. That if *the owner* of any vessel transporting merchandise or property *to or from any port* in the United States of America shall *exercise due diligence to make the said vessel* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, *or charterers* shall become or be held responsible for damage or loss resulting from *faults or errors* in navigation or in the management of said vessel nor shall the *vessel,* her owner or owners, charterers, *agent,* or master be held liable for losses arising from dangers of the sea *or other navigable waters,* acts of God, or public enemies, *or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, masters or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.*

SEC. 5. *That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be*

other person representing such vessel, has issued bills of lading for merchandise or property containing clauses that are declared not lawful by section 1 or section 2 of this act, or if he is informed and is satisfied that the owner, agent, master, or other person representing such vessel, will not issue bills of lading, as required by section 4 of this act, for merchandise or property delivered to and received by the vessel for transportation; and the said collector shall withhold clearance papers to said vessel until bills of lading or shipping documents are issued to conform to the said first, second, and fourth sections of this act, or if documents have been previously issued, until they are modified to conform to the requirements of said sections.

SEC. 6. That this act shall not be held to modify or repeal Sections 4281, 4282, and 4283 of the Revised Statutes of the United States.

SEC. 7. That this act shall take effect from and after the 1st day of *September, 1892.*

(Passed the House, amended to read as above, December 16, 1892. 24 Cong. Rec., pp. 147–149, 169.)

liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, *or any other statute defining the liability of vessels, their owners, or representatives.*

SEC. 7. *Sections one and four of this act shall not apply to the transportation of live animals.*

SEC. 8. That this act shall take effect from and after the first day of *July,* eighteen hundred and *ninety-three.*

Passed the Senate as amended February, 1893. 24 Cong. Rec., 1275. Senate amendments concurred in February 8th, 1893. 24 Cong. Rec., 1342.

Approved, February 13, 1893.

Court U.S.
ED
APR 10 1899
JAMES H. McKENNEY,
Clerk

No. 194. A 5

Brief of Kirlin for Appel

SUPREME COURT OF THE UNITED STATES

Filed Apr. 10, 1899.

OCTOBER TERM, 1898

No. 194

James Knott

Respondent-Appellant

against

The Botany Worsted Mills

Libelant-Appellee

The Same

against

Henry P. Winter and others

Libelants-Appellees

BRIEF FOR THE APPELLANT

CONVERSE & KIRLIN

Proctors for Appellant

J. PARKER KIRLIN

Advocate

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Supreme Court of the United States,

OCTOBER TERM, 1898.

JAMES KNOTT,
Respondent-Appellant,

AGAINST

The BOTANY WORSTED MILLS,
Libelant-Appellee.

No. 194.

JAMES KNOTT,
Respondent-Appellant,

AGAINST

HENRY P. WINTER and others,
Libelants-Appellees.

BRIEF FOR APPELLANT.

Statement.

The above causes come before the Court by virtue of writs of *certiorari* issued to the United States Circuit Court of Appeals for the Second Circuit, December 7, 1897 (Rec., p. 57).

The libels were filed in the Southern District of New York to recover damages for injury to certain bales of wool, whilst on a voyage from Buenos Ayres, Argentine Republic, to New York, in respondent's

steamer *Portuguese Prince*. The voyage was begun December 21, 1894, and ended about March 30, 1895. The damage was caused by the drainage of wet sugar from an adjoining compartment.

The wool was stowed in the forward compartment of the ship, known as the No. 1 between-decks, the space immediately under the top deck and abaft the collision bulkhead (p. 16). The between-deck space, from the collision bulkhead to the engine-room bulkhead, was divided into two compartments by a temporary wooden partition or bulkhead. That part of it forward of the wooden partition is called, in the testimony, the No. 1 between-decks, and that part abaft and between it and the engine-room bulkhead is called the No. 2 between decks. The wool was in bales stowed on end and properly dunnaged off the deck with deals about 2½ or 3 inches thick p. 17). It extended from the collision bulkhead aft to within about ten feet of the temporary wooden partition dividing this space from the No. 2 between-decks. The ten feet of space right across the ship between the wool and the bulkhead was left vacant (p. 17). The dunnage under the wool was in excess of the customary amount (p. 17).

The wooden bulkhead between the No. 1 and No. 2 between-decks was not tight and was not intended to be so. It was supplied with doors, affording access from one compartment to the other (p. 17). There is no rule requiring any bulkhead at this place. There is nothing in the record in any way contradicting the respondent's testimony that the wool was properly stowed and dunnaged and was put in a proper place at Buenos Ayres (pp. 17, 21).

The bills of lading issued for the wool (Exhibits B and C) accorded a privilege to the steamer to trade at intermediate ports as follows:

"With liberty * * * to call at any port or ports in or out of the customary route" (between Buenos Ayres and New York) "in any order, to receive and discharge * * * cargo * * * and for any other purpose whatever; and with liberty to

carry goods, or horses, cattle, sheep, or other live animals, on deck or elsewhere, in the said ship, and to carry goods of all kinds, dangerous or otherwise."

The ship sailed from Buenos Ayres December 25, 1894. After calling at Santos, Rio de Janeiro, Bahia and Maceo, she arrived at Pernambuco February 19, 1895 (p. 29). At this port sugar was stowed in the No. 2 between-decks (p. 28). This was green sugar in bags, and about two hundred tons of it were placed in the No. 2 between-decks, extending from the engine-room bulkhead forward to within 25 or 30 feet of the wooden bulkhead above mentioned. The bags were stowed in tiers properly dunnaged with 3-inch deals, and hatch covers under the whole of it (pp. 16, 17).

This mode of stowage left between the sugar and the temporary bulkhead a space of from 25 to 30 feet in which there was no cargo (p. 16). Counting the space of ten feet between the bulkhead and the wool in the No. 1 between-decks (p. 17) it was 35 or 40 feet from the sugar to the wool.

The between-deck under the wool and sugar was of iron (p. 19). It was drained by four scupper pipes leading to the bilges in the lower hold. One of these scuppers was located on the port and one on the starboard side in the after part of the No. 2 between decks, just forward of the engine room bulkhead (p. 18). The other two were abreast the foremast, one on each side, just forward of the temporary bulkhead (p. 19). These scuppers were of large size, the vessel having been originally built for the cattle trade (p. 18).

On leaving Pernambuco, February 24, 1895, the draught of the ship was 21 feet 6 inches forward, and 22 feet 4 inches aft, or 10 inches by the stern (p. 29). In this trim the drainage from the sugar flowed down the two after scuppers to the lower bilges (pp. 19, 20).

The next port of call was Para, where the ship

arrived March 3, 1895, her draught then being 21 feet 3 inches forward and 21 feet 9 inches aft, or 6 inches by the stern (p. 29). During this voyage, the weather was continuously fine (Log, pp. 31–37).

At Para she discharged cargo, but took none in (pp. 37–38). On the 4th of March, she discharged from the No. 2 and No. 3 holds (No. 3 being abaft the engine-room). On the 5th she discharged from the No. 1 and No. 4 holds; on the 6th from the No. 5 hold and lazarette, and from Nos. 1 and 2 holds; on the 7th two gangs forward and one gang worked aft. The place from which she discharged on the 8th of March is not stated. On the 9th of March she discharged with one gang forward and one aft, finishing the Para cargo forward and starting on the No. 5 lower hold. On the 10th of March she discharged from No. 4 and No. 5 holds, and at 5.30 P. M. finished unloading all Para cargo (Log., pp., 37, 38). No cargo was laden at this port.

At 8 P. M. of the 10th, the ship sailed for Port of Spain, Trinidad (pp. 38, 29). Her draught on sailing was 19 feet 6 inches forward and 17 feet 6 inches aft, or 2 feet *by the head* (p. 29).

At Port of Spain, March 13–18, the ship was again by the stern. She left there drawing 18 feet forward and 19 feet aft (p. 29).

In lieu of the examination of the officers of the ship, it was stipulated between the parties as follows:

"Wet sugar was stowed in the No. 2 'tween-decks at Pernambuco. There was a wooden bulkhead, not tight, between this place and the forward or No. 1 'tween-decks, in which libelant's wool was stowed. There was no damage to the wool from sugar drainage until the ship was trimmed by the head at Para, as shown in the official log which is offered in evidence. It was damaged by sugar drainage finding its way through the bulkhead and reaching the wool at Para, or between Para and Port of Spain. After the ship was again trimmed by the stern at Port of Spain, none of the

drainage from the sugar found its way into the forward 'tween-decks. The Court may draw inferences" (p. 28).

The libelants produced no evidence of fault in the stowage either of the wool or of the sugar. Respondent's evidence, as to the proper stowage of each, at the time and place of stowage, is uncontradicted. It stands conceded on the record that the mode of stowage was sufficient and proper after the sugar was laden at Pernambuco, during the voyage thence to Para, and at Para (or afterwards) until the drainage ran forward, owing to the improper trim of the ship 2 feet by the head.

It thus appears, (*a*) that the wool was properly placed and stowed at Buenos Ayres; (*b*) that the sugar was properly placed and stowed at Pernambuco; (*c*) that the wool went in safety from Pernambuco to Para, the ship being then in proper trim; (*d*) that sugar drainage damaged the wool while she was in improper trim between Para and Port of Spain; (*e*) that there was no further damage after the trim was again put right in Port of Spain.

It was testified that the master should not have allowed the ship to be trimmed by the head without moving either the wool or the sugar to the afterpart of the ship (pp. 20, 21).

The bills of lading under which the wool was carried contained the following paragraph of exceptions:

"The Act of God; the Queen's enemies; pirates, robbers of whatever kind, whether on board or not, or by land or sea; barratry or *negligence of masters or mariners*; adverse claims, restraints of Princes, Rulers or people; loss or damage, resulting from effects of climate, heat of holds, vermin, rain, spray, insufficiency in strength of wrappers and packages, non-marking, obliteration, or insufficiency of marks, and all injury to the same, sweating, rust, natural decay, leakage, or breakage, and *all damage arising from* [*to*] *the goods by stowage*, or *contact with, or* by sweating, *leakage*, smell, or evaporation from them,

or from the leakage, or flow of, or from contact with, the urine, manure, water, or drainage of horses, cattle, sheep or other animals carried on the said ship, or from their stalls, however caused, or otherwise howsoever, or from errors, obliterations, or other insufficiency or absence of marks, numbers, addresses, or description of any goods shipped, risk of lighterage, to or from the vessel, risk of craft or hulk, or storage or transhipment, or transhipment from or to craft, explosion, heat, fire before loading, or in the ship, or after unloading, or at any time and place whatever, boilers, steam, or machinery, or their appurtenances, or from the consequences of any damage, breakdown or injury to, or defect in hull, tackle, boilers or machinery, or their appurtenances, refrigerating engine chamber, or any part thereof, outfit, tackle, or other appurtenances, however such damage, defect, or injury may be caused, and notwithstanding that the same may have existed at, or at any time before the loading or sailing of the vessel; collision, stranding, straining, jettison of any kind, including jettison or washing overboard of cattle, or goods carried on deck, or any other peril of the Seas, Rivers, Navigation, or of Land Transit of whatsoever nature or kind, *and whether any of the perils, causes or things above-mentioned, or the loss or injury arising therefrom, be occasioned by the wrongful act, default, negligence or error in judgment of the owners, masters, officers, marines, crew, stevedores, engineers, and other persons whomsoever in the service of the ship, whether employed on the said steamer or otherwise, and whether before, or after, or during the voyage, or for whose acts the shipowner would otherwise be liable*, or by unseaworthiness of the ship at the beginning, or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness or by any cause whatever excepted."

It also contained the following clause:

"8. This contract shall be governed by the law of the flag of the ship carrying the goods, except that general average shall be adjusted according to York-Antwerp Rules, 1890."

The *Portuguese Prince* is a British ship (Libels, pp. 1, 18). It is admitted in the answer to the seventh

interrogatory (pp. 7–8) which stands as the answer of both libelants (p. 14) that the English law permits shipowners "to make contracts which exempt them from liability for the negligence of their servants in loading, stowage and carriage of goods."

There were no "allegations of fact upon which the libelant relies in support of this suit" in either libel, which in this failed to comply with Admiralty Rule No. XXIII. of this Court. In their answer to interrogatories, however, the libelants stated the following particulars of fault:

(1.) The flow of drainage from the sugar forward upon the wool, due to the vessel being out of proper trim (p. 7).

(2.) The temporary bulkhead between the No. 1 and No. 2 between-decks was not tight (p. 7).

(3.) The improper stowage of the wool in a place where the drainage of the sugar could reach it (p. 7).

(4) Unseaworthiness as to said cargo in the place where it was stowed (p. 7).

Respondent invoked in his defense:

(*a*) The above exceptions in the bill of lading, as construed under British law, and

(*b*) (In the alternative) the provision of the third section of the Harter Act, which exempts shipowners from faults or errors in the management or navigation of the ship (pp. 4–5).

The District Judge held:

(1.) "The primary cause of damage was negligence and inattention in the loading or stowage of the cargo, either regarded as a whole or as respects the juxtaposition of wet sugar and wool bales placed far forward" (p. 46).

(2.) That the damage was not due to the "management of the ship" within the Third Section of the Harter Act (p. 46).

(3.) That the express exemptions of the bill of lading, and the stipulation for English law should

not be upheld (pp. 48–49). The decision is reported in 76 Fed. Rep., 582.

The Court of Appeals, in a *per curiam* opinion, held:

(1) That the damage was due to negligence in the loading or stowage of the cargo;

(2) And further, as follows:

"A majority of the Court also concur in the conclusions of the Court below, that the exception in the bill of lading of the liability for 'damage by stowage, * * * though caused by the negligence of the master,' notwithstanding the provision that the contract should be governed by the law of the flag (English), did not relieve the owner of the steamship, such stipulation being against the public policy of this country, and, therefore, not enforcible by its Courts, and approve the decisions in *The Trinacria* (42 Fed. Rep., 863); *The Glenmavis* (69 Fed. Rep., 472); *The Iowa* (50 Fed. Rep., 561)" (p. 54).

Lacombe, Circuit Judge, concurred in the result (p. 56), (82 Fed. Rep., 471). The respondent thereupon sued out this writ.

POINTS.

I.

The loss was within the exceptions of the bills of lading.

The material provisions of the contracts are the following:

"To be delivered in the like good order and condition at the aforesaid port of New York * * * negligence of master or mariners * * * and all damage arising from [to] the goods by stowage, or

contact with, or by sweating, leakage, smell, or evaporation from them * * * however caused or otherwise howsoever * * * or any other peril of the seas, rivers, navigation * * * of whatever nature or kind, and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom be occasioned by the wrongful act, default, negligence, or error in judgment of the owners, masters, officers, mariners, crew, stevedores, engineers, and other persons whomsoever in the service of the ship, whether employed on the said steamer or otherwise, and whether before or after, or during the voyage, or for whose acts the shipowner would otherwise be liable, or by unseaworthiness of the ship at the beginning, or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness * * * excepted."

(**a**) Whether the loss be deemed to be due to negligence in loading and stowage, as held in the lower courts (pp. 46, 54), or to the master's omission to shift the wool, when he permitted the ship to be trimmed by the head at Para (pp. 20-21), or to his mismanagement of the ship, in allowing the trim to be changed at that port, so that the drainage, which was intended to pass down the after scuppers, flowed forward on to the wool, it was clearly owing to "*negligence of master or mariners*," one of the excepted causes.

The libelants contend that the loading and stowage were functions of the ship's agents, at the various ports; but the testimony of the Superintendent of the Line on this point is not disputed:

"Q. Whose duty was it, as between the agent and the master in Brazil, to attend to the placing of the cargo in Brazil, its stowage and the trim of the vessel itself?

A. The master's duty" (p. 28).

This is also the law. In *Lawrence* v. *Minturn*, 17 How., 100, Mr. Justice Curtis clearly announced the principle:

"As the quantity of lading and the consequent *trim* and seaworthiness of a vessel are matters as to which the master is, generally speaking, bound to exercise his skill, and over which he is instrusted for the benefit of all concerned with a supervision, his failure to do so properly is negligence for which the owner may be liable" (p. 111). "The *master* is bound to use due diligence and skill in stowing and staying the cargo; but there is no absolute warranty that what is done shall prove sufficient" (p. 116).

Faults in stowage are within the exception of "negligence of master and mariners" (The *Duero*, L. R., 2 A. & E., 393).

If the loss was due to the master's failure to shift the wool at Para (pp. 20-21) it would fall within the same principle as fault in the original stowage.

If it should be considered as primarily due to want of care of the vessel, indirectly affecting the cargo, this would be a fault in management or navigation and clearly within the exception of "negligence of master and mariners" (*Fonseca* v. *Cunard S. S. Co.*, 153 Mass., 553; The *Glenochil* (1896), Prob., 10).

(**b.**) In both of the courts below it was considered that the loss was within the exception of "damage by stowage, * * * though caused by the negligence of the master" (Opinion of Court of Appeals, p. 54; of Brown, *J.*, p. 48).

The only question, on this subject, in both Courts, was whether or not the exception should be enforced. It was held that though the contracts, made in Buenos Ayres, provided they should be governed by the law of the ship's flag (British), and though, by that law, the stipulations here referred to were admitted to be valid, they could not be upheld because opposed to the public policy of this country.

II.

The contract should be expounded in accordance with the law selected by the parties to govern their rights. It is not against the public policy of this country for foreigners, in a foreign port, to contract that their rights and obligations under bills of lading shall be governed by the law of the ship's flag. If it were contrary to such policy, that circumstance would not justify a refusal to enforce the contract as respects a breach occurring beyond our jurisdiction.

(1.) The general principle is well settled that where it appears expressly, that the parties have contracted with reference to a foreign law, it is the law of this country that such foreign law, *prima facie* should be applied in expounding the contract (*Wayman* v. *Southard*, 10 Wheaton, 1, 48; *Pritchard* v. *Norton*, 106 U. S., 124, 137; *Watts* v. *Camors*, 115 U. S., 353, 362; *Liverpool Steam Nav. Co.* v. *Phenix Ins. Co.*, 129 U. S., 397, 447; *The Oranmore*, 24 Fed., 922, 928; The *Trinacria*, 42 Fed., 863, 864; see also *Dobell* v. *S. S. Rossmore Co.* (1895), 2 Q. B., 408).

This was clearly laid down in *Pritchard* v. *Norton* (*supra*), where Mr. Justice Matthews, speaking for the Court (pp. 136, 137) said:

"The law we are in search of, which is to decide upon the nature, interpretation and validity of the engagement in question, is that which the parties have, *either expressly* or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Chief Justice Marshall in *Wayman* v. *Southard*, 10 Wheat., 48, where he defined it as a principle of universal law. 'The principle that in every forum a contract is governed by the law with a view to which it was made.' The same idea has

been expressed by Lord Mansfield in *Robinson* v. *Bland*, 2 Burr, 1077. 'The law of the place,' he said, 'can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed.' And in *Lloyd* v. *Guibert*. L. R., 1 Q. B., 120, in the Court of Exchequer Chamber, it was said that 'it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather by what general law it is just to presume that they have submitted themselves in the matter' (*Le Breton* v. *Miles*, 8 Paige, 261).

"It is upon this ground that the presumption rests, that the contract is to be performed at the place where it is made, and to be governed by its laws, there being nothing in its terms, or in the explanatory circumstances of its execution, inconsistent with that intention.

"So, Phillimore says (4 Int. Law, 469): 'It is always to be remembered that in obligations it is the will of the contracting parties, and not the law which fixes the place of fulfillment—whether that place be fixed by *express words* or by *tacit implication*- as the place to the jurisdiction of which the contracting parties elected to submit themselves.'

"The same author concludes his discussion of the particular topic (4 Int. Law, Sec. DCLIV., pp. 470-471) as follows:

"'As all the foregoing rules rest upon the presumption that the obligor has voluntarily submitted himself to a particular local law, that presumption may be rebutted either by an express declaration to the contrary, or by the fact that the obligation is illegal by that particular law, though legal by another. The parties cannot be presumed to have contemplated a law which would defeat their engagements.'"

In the case of the *Montana* (*Liverpool* v. *Phœnix Co.*), 129 U. S., 397, Mr. Justice Gray (at p. 548) said:

"This review of the principal cases demonstrates that according to the great preponderance if not the uniform concurrence of authority, the general rule that the nature, the obligation and the interpretation of a contract are to be governed by the law of

the place where it is made, *unless the parties at the time of making it have some other law in view*, requires a contract of affreightment made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, *unless the parties, when entering into the contract, manifest a mutual intention that it shall be governed by the law of some other country.*"

In *Greer* v. *Poole*, 5 Q. B. D., 272, Lush, *J.*, delivering the judgment of himself, and Cockburn, *C. J.* (p. 274), said:

"It is no doubt competent to an underwriter on an English policy *to stipulate*, if he thinks fit, that such policy *shall be construed and applied in whole or in part according to the law of any foreign state*, as if it had been made in and by a subject of the foreign state, and the policy in question does so stipulate, as regards general average."

In *Jacobs* v. *Credit Lyonnais*, 12 Q. B. D., 589, Lord Justice Bowen dealt with the same subject with characteristic breadth of view and good sense. He said:

"It may be that the contract is partly to be performed in one place and partly in another. In such case the only certain guide is to be found in applying sound ideas of business, convenience and sense to the contract itself, with a view to discovering from it the true intention of the parties. Even in respect of any performance that is to take place abroad, the parties may still have desired that their liabilities and obligations shall be governed by English law; or it may be that they have intended to incorporate the foreign law to regulate the method and manner of performance abroad, without altering any of the incidents which attach to the contract according to English law. Stereotyped rules laid down by juridical writers cannot therefore be accepted as infallible rules of interpretation in these days when commercial transactions have altered in character and increased in complexity, and there can be no hard and fast rule by which to construe the multiform commercial agreements with which in modern

times we have to deal" (p. 601). "The first matter we have to determine is, whether this contract is to be construed according to English law or according to French. To decide this point we must turn to the contract itself, *for it is open in all cases for parties to make such agreement as they please as to incorporating the provisions of any foreign law with their contracts*" (p. 599).

In *Hamlyn* v. *Talisker* (1894), App. Cas., 202, a contract was made in London between an English firm and a Scotch firm, which was to be performed in Scotland, but contained a stipulation that any dispute arising under it should be settled by arbitration, by two members of the London Corn Exchange or their umpire. The Scotch courts held that the arbitration clause was governed by the law of Scotland, inasmuch as that country was the *locus solutionis*, and that the reference, being to arbitrators unnamed, was invalid. The House of Lords reversed this decision, holding that the contract was governed by English law. Lord Watson (pp. 212, 213), said:

"When two parties, living under different systems of law enter into a personal contract, which of these systems must be applied to its construction *depends upon their mutual intention, either as expressed in their contract*, or as derivable by fair implication from its terms. In the absence of any other clear expression of their intention, it is necessary and legitimate to take into account the circumstances attendant upon the making of the contract and the course of performing its stipulations contemplated by the parties; and amongst these considerations, the *locus contractus* and the *locus solutionis* have always been regarded as of importance, although English and Scotch decisions differ in regard to the relative weight which ought to be attributed to them when the place of contracting is in one forum, and the place of performance in another. In the present case it does not appear to me to be necessary to discuss the relative value of these considerations, because, in my opinion, *the clause of reference is expressed in terms which clearly indicate that the*

parties had in contemplation and agreed that it should be interpreted according to the rules of English law. If they had stipulated that all disputes arising out of the contract were to be decided in the Court of Sessions, I should have been of opinion that they had in view the principles of Scotch law, and meant that their mutual stipulations should be construed according to these principles." * * * "They (respondents) also contended that the Court of Sessions were not bound to recognize any reference to unnamed arbiters, whatever might be its validity elsewhere, to the effect of excluding their own jurisdiction, because its recognition would be contrary to the policy of Scotch law. Neither of these contentions is, in my opinion, well founded."

In *Miller* v. *Heinrick* (4 Campbell, 155), an English court held that a Russian contract for seamen's wages payable monthly, " subject to the deductions provided for by the agreement of the Russian Marine," was to be governed in that respect by the law so mentioned. In *Este* v. *Smith* (23 Law Journal Chancery, 705), 18 Beavan, 122, it was stated that English subjects on their marriage may stipulate that their rights shall be regulated by the law of a foreign country; and the courts of England will enforce such a contract. Similar in effect are *Byam* v. *Byam* 19 Beavan, 58; *Westlake, Private International Law*, Section 371. In *Van Schaick* v. *Edwards*, 2 Johnson's Cases, 367, Kent, *J.*, held that where it was clear the parties had a view to the laws of another State in the execution of the contract, then undoubtedly the contract was to be governed by such foreign law.

(2.) No sufficient reason appears, in the present case, for refusing to apply the British law in determining the rights of the parties under the bills of lading.

(a.) The contracts were signed abroad. It is immaterial whether or not they were valid in all respects by the law of the Argentine Republic

(though probably they were), because the *lex loci contractus* is never held to prevail where the parties intended some other law to govern their contract. By the express provision for the law of the flag, the Argentine law, as well as our own, was excluded from application (Bond, Circuit Judge, in the *Oranmore*, *post*, Appendix B., pp. 54–55). The contract was in all respects valid by the law in respect of which the parties, in a foreign port, deliberately contracted. The effect is the same therefore, as though the contracts were in fact valid by the *lex loci contractus*.

(**b**.) The parties to the contracts of carriage were foreigners. It is alleged in both libels that the *Portuguese Prince* was a British steamship. In all three of the bills of lading it is recited that the shippers Wantge & Schlief, and Henry Caulliez, were "of Buenos Ayres." The goods covered by the two bills marked Ex. B. (p. 14), being those involved in the Botany Worsted Mills case, were made deliverable "to order." The goods shipped by Caulliez under Ex. C. were consigned to Winter & Smillie. But notwithstanding this fact the contract was with the shipper, who signed the captain's copy of the bill of lading individually (*vide* Ex. C, pp. 28–29). All of the parties to the contracts at the time of shipment were, therefore, presumptively at least foreigners.

(**c**.) The stipulation for the law of the flag was reasonable, and tended to provide uniform rules for the determination of different kinds of possible controversies during the voyage.

The carrying vehicle was a British vessel. The voyage took the steamer into ports of the Brazils, through or by the Windward Islands, to the British port of Port of Spain, and thence to New York. In case of distress she might have put into Danish, Spanish, Brazilian or French ports with slight deviation.

Without this clause in the contracts, what law would, in such case, have been applied to decide

the mutual rights and liabilities of ship and cargo, in the different foreign ports? If by reason of distress a bottomry bond was issued, it may be presumed that any question under the bond would have been determined by the law of the flag (*Pope* v. *Nickerson*, 3 Story, 465, 484-5; *Lloyd* v. *Guibert*, L. R., 1 Q. B., 115; *The Karnack*, L. R, 2 P. C., 505, 512; *The Gaetano and Maria*, 7 P. D., 137; *Liverpool* v. *Phenix Ins. Co.*, 129 U. S., *at p.* 449). In case of damage to the cargo in a British port, by collision with another British vessel, while a compulsory pilot was in charge, the cargo's rights would have been subject to English law (*Smith* v. *Coudry*, 1 How., 23; *The Peerless*, 1 Lush., 30, 40; *The Scotland*, 105 U. S., 24, 29; *The Belgenland*, 114 U. S, 355, 370). But if the collision occurred in a Brazilian or other foreign port, under like circumstances, and the voyage had to be abandoned, the cargo's rights against the carrying vessel would have been liable to be decided by laws that neither party ever thought of as likely to govern their relations.

The law under which the parties in such circumstances would be liable to come might depend on the accident that a suit had to be begun in this or that port for the preservation of a remedy. Surely nothing can be said against the good sense of providing that all the mutual rights of the parties throughout the voyage, and in whatever port, shall be governed by a system of laws they know about and agree to, and which, without their agreement, are bound to be applied in certain possible contingencies. It is merely, in effect, a provision that all the rights during the voyage shall be governed by the law, which, with or without it, would be applied in certain possible contingencies. It is a provision for a uniform system of law, which all must concede is desirable.

It is a mistake to assume that this stipulation is designed merely to evade our law on the subject of negligence exemptions. The clause is now in very general use, not only in bills of lading to this country, but also to others. For example it is proved here that the steamer took cargo from Buenos Ayres to ports

in Brazil; from some ports in Brazil to others in the same country; and from Brazilian ports to New York. The bills of lading are headed: "Prince Line, James Knott, Newcastle-on-Tyne, River Plate and/or Brazils to U. K., Continent, Mediterranean or United States." It is a fair assumption that all the bills used in these various trades are uniform in their provisions. Vessels trading to such a wide range of ports necessarily fall under the scope of widely different systems of laws; and if it is not competent for the shipowner to bargain for Law-of-the-Flag contracts, how can he possibly adjust his freight rates to meet the varying measure of his obligations? The Court must presume the freight has a direct relation to the responsibilities undertaken. The real situation, then, is this. The shipowner, in effect, says: "I do not know the laws of all the countries to which my ships trade, but I will freight your goods on contracts governed by the law of the flag for so much." It is a foreign transaction, valid by the law the parties agree shall govern their rights. Certainly it cannot be said to be immoral or unfair. The shipper is not under the compulsion that in *Ry. Co.* v. *Lockwood*, 17 Wall., 357, was said to exist in cases of railways passing points without competing lines. At every considerable port in the world there is not only the competition of the enterprising "tramp," but also of rival lines and of sailing craft. In every fair commercial sense it is an honorable agreement, to which the parties should be held, in whatever forum their differences may be brought for adjudication (168 U. S., p. 113).

(**d**.) There is nothing in our public policy which pohibits foreigners, or parties contracting abroad from providing that their rights and obligations touching matters done or to be done without our jurisdiction, shall be governed by a foreign law.

The grounds upon which the public policy cases have been rested are (*a*) that upholding negligence clauses would be injurious to one of the parties to the contract; (*b*) that (in railway cases) they are op-

pressive to the whole class of shippers; and (*c*) that they tend to injure the public by encouraging negligence on the part of the carrier's servants. It is doubtful whether any of these is a sound business ground for refusing sanction to these clauses at the present day; (*a*) to do so is equally injurious to the party whose contract is upset; (*b*) in the eager competition for business, especially in maritime commerce, the question is not at all one of oppression, but is one of liberty to contract; and in a large class of cases Congress, by the Harter Act, has given absolution for the most common forms of negligence without even the formality of an agreement; and (*c*) it would be difficult indeed, to prove that carriers' employees are any more careful, or insurance rates any cheaper, in States or countries where these contracts are set at naught, than in those where they are held binding. But taking the law as we find it, the public policy considerations can, at the most, apply only to contracts made here or to be wholly or substantially performed here. They have no just application to contracts made, acts done, or negligence committed wholly without the country. At least, this Court has never said they have, and the drift of certain cases in the lower courts, as well as the reason of the matter tend to that view.

In the *Trinacria*, 42 Fed., 863, and *Baetjer* v. *La Compagnie*, 59 Fed., 789, it was held by Judge Brown that the foreign law governed as to acts done in Italy and France, the ports of shipment, and negligence exemptions covering such acts were in both cases upheld. In the *Trinacria* (*supra*, p. 864) he said:

"The vessel was a British vessel, and the bills of lading excepted loss through negligence by any person in the service of the ship, and loss from leakage, stowage or perils of the seas. As the contract was made in Italy by an English master of an English ship and by an English bill of lading the contract and the exceptions above referred to are valid as respects all acts done thereunder within Italian territory.

"It is no part of the law or policy of this country to invalidate the contracts of parties lawfully made

abroad, *so far as respects performance there*, or to apply our law to the consequences of such performance there, the acts being neither criminal by our laws nor *mala in se*."

The same learned Judge, however, in that case, and in the *Guildhall*, 58 Fed., 796, drew a distinction between negligence in the port of shipment and negligence on the high seas, and in the case at bar between it and negligence at a foreign port of call, refusing in both classes of cases to enforce the contracts. With submission there does not seem to be any substantial distinction between the cases. The alien port of call and the high seas, beyond our jurisdiction, are equally as foreign to us, and our public interests, as the foreign ports of shipment. To acknowledge that our courts can uphold negligence clauses, covering acts done at foreign ports of shipment, concedes the whole point for which the appellant is contending. This was so held in Massachusetts, where the Court applied the foreign law to a case of negligence "on the voyage" and absolved the ship (*Fonseca* v. *Cunard*, 153 Mass., 553).

The other cases in the lower courts (except *Lewishon* v. *National Co.*, 56 Fed., 602, which is opposed to the *Trinacria* and *Baetjer* v. *La Compagnie*, *supra*) rest either upon the ground that negligence clauses coupled with a stipulation for foreign law which would give them validity, cannot be enforced (1) when made in this country (The *Brantford City*, 29 Fed., 573; The *Energia*, 56 Fed., 124; *Brauer* v. *Compania La Flecha*, 57 Fed., 403; The *Iowa*, 50 Fed., 561), or (2) where the negligent act relates to that part of the contract to be performed within our jurisdiction (The *Glenmavis*, 69 Fed., 472).

The vice in the principle on which these cases rest, is that in effect it originates and establishes rights and obligations in respect of the contracts of carriage, which did not accompany their inception (*The Infanta*, Abbott's Adm., 263, 267); and that it permits the libelants who have the right to select the forum, to impose a varying measure of obligation upon the respondent, according to the law of the

place in which he may bring his suit, notwithstanding the provision in the contracts to the contrary.

On the other hand, in The *Oranmore* (24 Fed., 922), Judge Morris, in the District Court, and Judge Bond on appeal (Appendix B, *post*, p. 54), held that a negligence clause in a contract made here, stipulating for English law, and to be performed mainly on the high seas and in England, should be upheld by our Courts.

The contract involved in that case was made in Baltimore, between an American citizen and a British corporation, and provided for the transportation of 320 head of cattle upon a British steamer from that port to Liverpool. The damage complained of occurred upon the high seas, but was alleged to be due to the insufficiency of the cattle fittings. The contract contained a negligence exemption which, if valid, exonerated the ship. In dealing with that class of contract which called for the application of Enlish law, Morris, *J.* (p. 927), said:

"The presumption is that the parties enter into a contract with reference to the law of the place where it is made, but this presumption is easily overthrown by circumstances which show that this was not the intention of the parties (*Whart. Confl. Laws*, 434).

"In *Cox* v. *U. S.* (6 Pet., 203), it is said by the Supreme Court:

" 'The law of the place where the contract is made is to govern in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere, in which case it is to be governed according to the law where it is to be executed.'

"The present question is not one which affects the capacity of the parties to make the contract. It is not a case in which, according to the American law, it could be said that there is no contract at all binding on the parties.

" It is merely a question of the extent and nature of the obligations and conditions of a contract. The law is thus stated in *Story Confl. Laws*, 242:

" 'Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another coun-

try, for, as we shall presently see, in the latter case the law of the place of performance is to govern.'

"At page 280 he further said:

"'The rules already considered suppose the performance of the contract to be in the place where it is made, either expressly or by tacit implication. But where the contract is expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance.'

"And the author cites as clearly expressing the rule the statement of Lord Mansfield:

"'The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed.'

"In *Whart. Confl. Laws*, 472, it is stated to be a rule fairly deducible from adjudged cases that where there are no other controlling circumstances, a contract of carriage is to be interpreted by the law of the carrier's principal office. In this case, although the contract was made in the United States, it was made in the port of Baltimore by a resident of Chicago with a British corporation for carriage in a British ship to a port in Great Britain, and the express agreement of the parties, deliberately made two months before the shipment, was that any question arising against the carrier under the contract or the bill of lading should be determined by the English law.

"Under all these circumstances, it seems to me the Court should give effect to the clause of the agreement. *It leaves the intention of the parties beyond doubt of any kind, and that intention was to give the provisions of the bill of lading such efficacy as the English courts would give to them.* As I understand the facts of the case and the rulings of the English courts upon similar bills of lading, I think the exceptions cover the injuries sustained by this libelant, and the libel must be dismissed."

An appeal was taken which was heard by Judge Bond, whose findings and conclusions appear from a certified copy thereof in Appendix B to this brief (pp. 54–55).

In *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S., 397, where the conrract was made here,

but the negligence occurred beyond our jurisdiction, the intimations of the Court seem to be that the foreign law would have been applied if the parties had evinced a clear intention in their contract to be governed by it.

Mr. Justice Gray, in delivering the opinion (p. 447), said:

"The general rule as to what law should prevail in case of a conflict of laws concerning a private contract was concisely and exactly stated before the Declaration of Independence by Lord Mansfield (as reported by Sir William Blackstone, who had been of counsel in the case), as follows:

"'The general rule established, *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception when the parties (at the time of making the contract) had a view to a different kingdom (*Robinson* v. *Bland*, 1 W. Bl., 234, 256, 258; s. c., 2 Burr., 1077).'"

Again (at p. 461):

"Both parties, or either of them, may have supposed the stipulation to be valid; or both or either may have known that by our law, as declared by this Court, it was void. In either aspect there is no ground for inferring that the shipper at least had any intention, *for the purpose of securing its validity, to be governed by a foreign law*, which he is not shown, and cannot be presumed, to have had any knowledge of. * * *

"Our conclusion on the principal question in the case may be summed up thus: Each of the bills of lading is an American and not an English contract, and so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country."

There is not to be found in that opinion the slightest intimation that if the conclusion had been that it was "an English and not an American contract" the Court would have declined to enforce it,

for reasons of public policy. The discussion there was not whether the public policy of this country forbids the enforcement of a good English contract, but rather whether it was an English contract. The implications in that and other cases in this court seem to be that if the contract is British, it may be upheld (*Compania* v. *Brauer*, 168 U. S., 104, 118; *Pritchard* v. *Norton*, 106 U. S., 124, 136-7; *Cromwell* v. *Co. of Sac*, 96 U. S., 51, 62; *Cox* v. *U. S.*, 6 Pet., 203).

If considerations of public policy can ever justify our courts in refusing to interpret a contract in accordance with the law with reference to which the parties have contracted, the circumstances ought to show conclusively, in every such case, that the judicial sanction of the agreement would work an injury to our public or commercial interests. It must be admitted that some of the cases in the District Courts, previously referred to, hold that our interests are injured in cases where the contract, exempting from negligence, is made here, or is to be wholly or in part performed here, and the negligent act occurs within our jurisdiction. It is not conceded that the principle should go to this length, where the stipulation providing for the foreign law is explicit (The *Oranmore, post*, App. B., pp. 54, 55). But even if it does, the present case would not fall within it, for here the negligent act occurred beyond our jurisdiction. The case is no different in principle than it would have been if the vessel had been bound to an English port and the action had been brought here. Actions are not infrequently brought in our courts where this country is neither the beginning nor the end of the voyage (*e. g.*, *O'Brien* v. *Miller*, 168 U. S., 287). If, in the present case, the destination had been England and the libels had been filed here, there can hardly be a doubt that our courts would have adjudicated the rights of the parties in accordance with the English law. Our public policy would not have been involved. The contract was made and the negligent act committed beyond our jurisdiction. There could

be no question of negligence in delivery, because the only fault complained of occurred in the early stage of the voyage. No reason would have existed for declining to apply the English law. Why should a different rule apply in the cases as they stand? Our public policy is no more involved by reason of the accident that the cargo was destined to this country than it would have been had the goods been bound to another. It is plain that in one case the foreign law would apply, and the reason of the matter appears to be that it should apply equally in the other.

(e.) The English cases on the question whether a foreign contract, contrary to public policy can be enforced in England have arisen where the breach involved arose in the performance of some part of the agreement within England.

The case of *Hope* v. *Hope*, 8 De Gex, M. & G., 731, arose under a contract executed in France between an English husband and a French wife, to be performed partly in France and partly in England. Certain of its provisions were repugnant to the public policy of England, but were alleged to be valid under the law of France. The suit was in respect of the performance of that part of the contract which was to take place *in England*, and hence the contract was not upheld. Lord Justice Knight Bruce (p. 740) said:

"But ought the document to be deemed, not merely in language, but also in substance, a French contract, and thus to be construed and have effect upon the principles and according to the rules of the French law, and consequently valid or invalid as they dictate, if at least it contains not any material provision tending directly *to infringe within England* the policy of the English law? And, secondly, does the bill state with sufficient fullness or distinctness what the rules or principles of the French law are so far as the suit or its subject is concerned? And, thirdly, does the document contain any material provision tending di-

rectly *to infringe within England* the policy of the English law? In my opinion not one of these three questions can be answered favorably for the plaintiff."

The remarks of Lord Justice Turner in the same case (p. 743), though general, are to be read in the light of the fact that the infringement of the British policy occurred in England, in connection with a part of the contract to be executed there.

In *Rousillon* v. *Rousillon*, 14 Ch. Div., 351, an injunction was sought to restrain the defendant from carrying on business as a wine merchant in England; to enforce payment of a judgment against him given in his absence by a French court; and to recover damages for a breach of defendant's agreement subsequent to the date of the French judgment. The contract between the parties restrained the plaintiff from engaging in business as a wine merchant for the period of ten years. The defendant resided in England at the time the contract was signed by him during a temporary sojourn abroad, and the breach complained of was committed within England. It was held that the foreign judgment could not be enforced, because the French court had no jurisdiction over the defendant when the judgment was rendered; that the contract in restraint of trade was not unreasonable, and could be enforced in England. The remarks of Lord Justice Fry (p. 369) are *obiter* merely, as he issued the injunction prayed for, and awarded nominal damages for the breach of contract.

The *dicta* in *Hamlyn* v. *Talisker* (1894), A. C., 202, cited by this Court in 168 U. S., at p. 118, fall within the principle applicable where the breach occurs in the country in which the suit is brought. The contract in that case was signed in England, but the business under it was to be conducted in Scotland, and the breach occurred in Scotland. Two of the judges intimated (pp. 209, 214) that the Scotch court would not be bound to

uphold a provision of the contract if contrary to the public policy of Scotland and Lord Watson intimated the contrary (p. 213), but the point was not decided, as the Court found that it was not contrary to such policy. What was said, however, related to a breach *in Scotland*, in the performance of that part of the contract which was to be executed there.

In *Printing and Numerical Registering Company* v. *Sampson*, L. R., 19 Eq., 462, at 465, Jessel, M. R., declared what we submit is the true doctrine, as follows:

"It must not be forgotten that you are not to extend arbitrarily these rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice."

In *Underwood* v. *Barker* (1899), 1 Ch., 300, 305, Lindley, M. R., dealt with the same subject as follows:

"If there is one thing more than another which is essential to the trade and commerce of this country it is the inviolability of contracts deliberately entered into; and to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, *prima facie* at all events, contrary to the interests of any and every country. Of course, I am not speaking of contracts induced by fraud, duress or undue influence, or impeachable on any other recognized ground of invalidity. Omitting all such cases, the public policy which allows a person who obtains employment, on certain terms understood and agreed to by him, to repudiate his contract conflicts with and must to avail the defendant prevail for some sufficient reason over the manifest public policy which, as a rule, holds him to his bargain."

Nothing said in any English case is really authority for the proposition that the public policy of

the *lex fori* is infringed by upholding a good foreign contract expressly made with reference to the foreign law, where the breach complained of occurs *beyond* the jurisdiction of the country of the forum; nor is there anything in the English law which intimates that in such a case the foreign law should not be applied.

(f.) Our State Court cases hold that the law with respect to which the parties have expressly or presumptively contracted, applies in the construction of international or interstate contracts, even though opposed to the public policy of the forum and invalid if made there.

In *Fonseca* v. *Cunard Steamship Co.*, 153 Mass., 553, the plaintiff took passage on the defendant's steamer from Liverpool to Boston. He had with him, on the ship, his trunk, containing articles of clothing and personal property reasonable and proper for an ocean traveler to carry as personal baggage, "all of which were entirely ruined *on the voyage* by the negligence of defendant." The passenger's ticket contained an exemption from loss of or injury to the passenger or his baggage, "whether arising from the act of God," &c. * * * "or negligence of the company's servants." The exemption from damage by the negligence of the company's servants would have been invalid if made in the State of Massachusetts, because contrary to its public policy. The Court, nevertheless, held that being valid by the law of England, where made, it should be upheld when the defendant was sued in the State of Massachusetts.

Knowlton, J., delivering the opinion of the Court, at page 557, said:

"The contract being valid in England, where it was made, and the plaintiff's acceptance of it under the circumstances being equivalent to an express assent to it, and it not being illegal or immoral, it will be enforced here, notwithstanding that a

similar contract made in Massachusetts would be held void as against public policy (*Greenwood* v. *Curtis*, 6 Mass., 358; *Forepaugh* v. *Delaware, Lackawanna & Western Railroad*, 128 Penn. St., 217, and cases cited; *In re Missouri Steamship Co.*, 42 Ch. D., 321, 326, 327; *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.*, 129 U. S., 397").

In *Forepaugh* v. *Dela , Lacka. & Western Ry. Co.*, 128 Penn. St. Rep., 217, the controversy arose under a contract made in New York for the carriage of freight from Binghamton to Cortland, in the same State. It contained a negligence exemption, and the Court found that, during the journey, the train parted through the negligence of an engineer, causing damage to the plaintiff's property. The place of the contract, the place of its performance and the scene of the accident were all in New York State. By the law of New York, negligence exemptions in the contracts of common carriers are valid, but by the law of Pennsylvania they are invalid. The Court below, applying the law of New York, upheld the negligence exemption and entered judgment for the defendant; and this judgment was affirmed on appeal. *Mitchell, J.*, in delivering the opinion of the Court (at p. 231) said:

"Holding, therefore, that the validity of this contract is to be determined by the law of New York, as decided by the Courts of that State, is there any reason why the Courts of this State should not enforce it? The general rule is, that Courts will enforce contracts valid by the law of the place where made, unless they are injurious to the interests of the State or of its citizens (*Story on Conflict of Laws*, Sections 38, 244). The injury may be indirect by offending against justice, or morality, or by tending to subvert settled public policy (2 *Kent*, 458; *Greenwood* v. *Curtis*, 6 Mass., 358; *Bliss* v. *Brainard*, 41 N. H., 256. But this does not imply that courts will not sustain contracts that would not be valid if made within their jurisdiction, or will not enforce rights that could not be acquired there. Thus, for example, the Courts of Pennsylvania have always enforced contracts for a higher rate of inter-

est than would be valid under the laws of this State (*Ralph* v. *Brown*, 3 W. & S., 395; *Wood* v. *Kelso*, 27 Pa., 243; *Irvine* v. *Barrett*, 2 Gr., 73).

"The contract in the present case does not directly affect the State or its citizens in any way. Nor is it in any way contrary to justice or morality. It may be doubted whether it is even so far contrary to the policy of the State that it would have been invalid if it had been made here. It has some exceptional features, which, it is argued, take it out of the ordinary rules governing the contracts of common carriers, and the case of *Coup* v. *Railroad Co.*, 56 Mich., 111, is a strong authority for that position. But, without stopping to discuss that point, which our general view renders unnecessary, it is sufficient to say that *even if it would not have been valid if made here, its enforcement as a New York contract does not in any way derogate from the laws of Pennsylvania, or injure or affect the policy of the State*, any more than would a foreign contract for what would be usurious interest here, and that, as already said, the courts have never hesitated to enforce."

In *Dugan* v. *Lewis*, 79 Tex., 256, a citizen of Texas negotiated a loan through bankers in New York, but the notes for the loan and the expenses, and the deed of trust upon lands in Texas to secure the loan, were executed in Texas and transmitted to New York, where the loan was perfected by the delivery of the borrowed money. The notes bore 10 per cent. interest, a rate permissible under the law of Texas, but usurious under the law of New York. A clause in the deed of trust provided that "the contract embodied in this conveyance, and the notes secured thereby, shall, in all other respects, *be construed by the laws of the State of Texas.*" This suit was brought against the payee and transferee of the notes, to restrain the enforcement of the deed of trust, on the ground that the contracts were governed by the laws of the State of New York, and were, therefore, usurious and void. It was held that, under the clause providing that they should be governed by the law of Texas, the suit was not maintainable.

This Court also has held that "when the rate of interest at the place of contract differs from the rate at the place of payment, the parties may contract for either rate, and the contract will govern" (*Cromwell* v. *County of Sac*, 96 U. S., 51, 62; citing *Miller* v. *Tiffany*, 1 Wall., 298; *Depau* v. *Umfries*, 8 Mart., N. S., 1; *Chapman* v. *Robertson*, 6 Paige, 627, 634; *Peck* v. *Mayo*, 14 Vt., 33; *Butters* v. *Olds*, 11 Ia., 1).

A similar rule has been held in Rhode Island, with reference to Sunday contracts (*Brown* v. *Browning*, 15 R. I., 422). And in *Commonwealth of Kentucky* v. *Bassford*, 6 Hill, 438, it was held that a contract made and to be performed beyond the State of New York in relation to a foreign lottery, if lawful where made, would be enforced in New York, though if made in New York it would be unlawful (see also *Thatcher* v. *Morris*, 11 New York, 438).

III.

The first and second sections of the Harter Act do not exclude the foreign law contracted for by the parties.

In the District Court it was held that these sections apply to contracts made abroad and invalidate the exceptions in the bill of lading opposed to them (p. 48), but in the Court of Appeals a majority held the public policy of our commerce forbade the enforcement of the contracts, finding it "unnecessary to decide whether the prohibitions of the Harter act apply to a bill of lading issued at a foreign port" (p. 54); while Judge Lacombe, concurring only in the result (p. 56), left it to be implied that he disagreed both with the District Judge and his own brethren on the point of law.

The same court previously declined to express an opinion on this point (The *Etona*, 38 U. S. App., 60).

(a.) The first and second sections of the act prohibiting the insertion in bills of lading of clauses relieving a shipowner from negligence in loading or stowage (*post*, pp. 49-50) do not seem to be designed to apply to contracts made abroad.

The original intention of the statute seems to have been to have it apply only to contracts of vessels trading between ports of the United States or to contracts made here for foreign voyages. This is indicated by form of the phrase which originally appeared in the first, second, third and fourth sections, making them applicable to "any vessel transporting merchandise or property from or between ports of the United States and foreign ports" (*post*, pp. 49-51), and by the subsequent change in the third section to make that one applicable to "any vessel transporting merchandise or property *to or from* any ports in the United States" (*post*, p. 50). If the original phrase was understood to cover vessels bound from abroad to ports in the United States, the amendment of the third section during the passage of the act was unnecessary. The fact that it was made indicates an intention to give the third section an application which it, in common with the other three, would not otherwise have had, namely, to vessels coming to our ports from abroad. The first and section sections having been left in final form as they originally stood, should be deemed to have a narrower application, and to apply only to contracts made within our jurisdiction.

This argument is reinforced by construction of the first and second sections with the fourth and fifth. The fourth section makes it the duty of the "master or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports" to issue a bill of lading to the shippers, stating marks, number of packages, &c., and the apparent order or condition

of such merchandise, which it is further provided shall be taken as *prima facie* evidence of the receipt of the merchandise therein described. It is not to be presumed that Congress intended this section to prescribe the duties of the owners, master or agents of vessels loading abroad, or that the provision stating the evidential value of such a document—a matter peculiarly within the law of the foreign forum—should be deemed to apply to foreign contracts. Section 5 provides that "for a violation of any of the provisions of this Act, the agent, owner or master of a vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for shall be liable to a fine not exceeding $2,000. The amount of the fine and costs for such violation shall be a lien upon the vessel whose agent, owner or master is guilty of such violation, and such vessel may be libeled therefor in any District Court of the United States within whose jurisdiction the vessel may be found. One half of such penalty shall go to the party injured by such violation, and the remainder to the Government of the United States."

The refusal to give a bill of lading in the form prescribed by Section 4, and without any of the clauses denounced by Section 1, would plainly be a violation of the act to which the punishments prescribed by Section 5 would apply. It could hardly be claimed, however, that it would be competent for the Congress to prescribe these penalties or for the Court to enforce them in cases of contracts made or violations of the statute committed in Buenos Ayres. The fact that the fourth section prescribing the form of the bill of lading applies in terms, like the first and second sections, to "any vessels transporting merchandise or property from or between ports of the United States and foreign ports," but obviously would not and could not be enforcible as respects contracts made in Buenos Ayres, would seem to indicate that the first and second sections, which cover the like classes of voyages, were also not intended to apply to such cases.

(b.) But all doubt as to the applicability of the Harter Act was removed by an explicit provision in the bill of lading that it should be controlled by the law of the flag. It was competent for either party to contract himself out of the benefits of the statute.

The third section provides that the ship owner shall not "*be held*" responsible for certain causes of damages there enumerated, provided he has used due diligence to make the ship seaworthy. Yet the courts have held, nevertheless, that he may contract himself out of the benefits of that section, and "be held" to greater liabilities (The *Silvia*, 68 Fed., 230, 233; *Hine* v. *New York & Bermudez Co.*, 73 Fed., 852, 853-5). If the shipowner can contract himself out of the benefits of the third section, the reciprocal rule that the shipper may also contract himself out of the benefits of the first or second section should also apply. So far as the statute bears on the duty of a Court, the third section is quite as strong as the first. The provision that the ship shall not "be held," is as direct and positive as the provision of the first section that the prohibited clauses "shall be null and void." If either party can contract himself out of the statute, both should be permitted to do so.

It has been held in England, under the Employers' Liability Act of 1880, that an express contract by which a workman engaged to forego the benefits of the act in the event of injury, was valid (*Griffiths* v. *Earl of Dudley*, 9 Q. B. D., 357).

The right to contract one's self out of a liability or penalty imposed by statute, appears to be well settled. It has been asserted in this country, and in this Court, in cases arising under statutes against usury (*ante*, pp. 30, 31). The maxim of law is "*Quivis renunciare potest juri pro se introducto*" (*Bovill* v. *Wood*, 2 M. & S., 23, per Bayley, *J.*, at p. 25); or, as it appears in Cod., 2, 3, 29, "*Omnes licentiam habere, his quæ pro se introducta sunt renuntiare.*" Cf. *Wilson* v.

Macintosh (1894), App. Cas., 129, at 133. In *Rowbotham* v. *Wilson*, 8 E. & B., 123, at 151, Martin, *B.*, says: "I cannot perceive any reason, either at law or otherwise, why parties should not be at liberty, by apt words, either to add to, or qualify, or make more or less extensive, the right which the law of itself provides and imposes, or, if they think fit, declare that such rights shall not exist at all. *Quilibet potest renunciare juri pro se introducto.*" Again, Erle, *C. J.*, in *Rumsey* v. *North-Eastern Ry.*, 14 (C. B. (N. S.) 641, at 649, says: "It is undoubtedly competent to any man to renounce a privilege which is given to him by a statute."

(**c**.) The Court will not refuse to sanction such a contract, merely because it may be opposed to public policy, if it be otherwise valid.

In *Printing and Numerical Registering Co.* v. *Sampson*, L. R., 19 Eq., 462, at 465, Jessell, *M. R.*, says: 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice." This passage was subsequently approved by Chitty, *J.*, in *Tullis* v. *Jacson* (1892), 3 Ch., 441, 445. See also per Jessell, *M. R.*, in *Wallis* v. *Smith*, 21 Ch. Div., 243, 266; *Underwood* v. *Barker* (1899), 1 Ch., 300, 305, quoted *ante*, p. 27; *Holmes on the Common Law*, 205. "It is clear," said Lord Campbell in a case of restraint of trade, "there would be evil if the law justified such a breach of contract; but it is by no means clear there would be any compensating good to the public from the publications intended by the defendant to be so made in violation of his promise to the plaintiff" (*Tallis* v. *Tallis*, 1 E. & B., 391, 413). As to the argument of public policy, Burrough,

J., says, in *Richardson* v. *Mellish*, 2 Bing., 229, 252: "I, for one, protest, as my Lord has done, against arguing too strongly upon 'public policy'; it is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

IV.

If the Harter Act applies to the case, the damage resulted from "faults or errors in navigation or in the management of said vessel" and was within the protection of its 3d section.

The District Judge was of opinion that the 3d section of the statute does not extend to a case like the present, "though" he adds, "the question has caused me no little embarrassment" (p. 46). The majority in the Court of Appeals concurred in this conclusion, without further discussion than to say the damage was due to "negligence in the loading or stowage of the cargo" (p. 54).

Both of the Courts below failed, as we contend, to attach the proper weight to certain undisputed and stipulated facts. Both necessarily found (for it was so stipulated) that "there was no damage to the wool from sugar drainage until the ship was trimmed by the head at Para" (p. 28, date March 10, p. 29); that "it was damaged by sugar drainage finding its way through the bulkhead and reaching the wool at Para or between Para and Port of Spain" (p. 28, dates March 10-16, p. 29); "that after the ship was again trimmed by the stern at Port of Spain none of the drainage from the sugar found its way into the forward 'tween-decks" (p. 28, dates March 18-31, p. 29), and that "the Court may draw inferences" (p. 28). The wool had been stowed in Buenos Ayres on

or before the preceding December 25th (p. 29), and the sugar in Pernambuco February 19th-24th (p. 29). Both, therefore, had been in the ship in the same places and in the same condition of stowage for about a fortnight without injury; and, concededly, they made the voyages from Pernambuco to Para, and from Port of Spain to New York, in safety. The undisputed evidence of good stowage and proper dunnage (*ante*, pp. 3, 4) is thus confirmed by the event. The stowage of itself was not only not negligent, but was admittedly sufficient to prevent damage; and the sole inference as to the cause of the damage is the improper trim of the ship by the head from Para to Port of Spain (p. 47). The failure to keep the ship trimmed by the stern so the drainage should flow "aft as designed" (p. 46), to the scuppers there located, would seem, under the circumstances, to be a "fault in navigation or in the management of the vessel" rather than "neglect in loading or stowage," and to have been the proximate cause of the damage.

(**a**.) There was no negligence in the manner of stowing the wool at Buenos Ayres, or in stowing the sugar at Pernambuco, considered either separately or with reference to each other.

So long as the vessel retained her proper trim, no damage could occur, and the master might reasonably have expected her to retain it throughout the voyage. There is no intimation in the evidence or in the opinions below, that when the sugar was stowed at Pernambuco there was ground to expect the ship would lose her trim, in subsequent discharging, or at any other time; nor that, if a change of trim was threatened, there would not be abundant opportunity to prevent it. There was, therefore, no negligence of any kind until, at Para, the ship was permitted to become and to remain by the head. Before that time the stowage of the sugar and wool had been completed. Therefore, there was no fault in the original stowage of the cargo.

Nor was there fault in the discharge of cargo at Para. It was necessary, and was, of course, expected, that the cargo consigned to Para should be taken out at that port, and it was taken out, for all that appears, in a proper manner as far as concerns the discharge itself. The change of trim was not a necessary consequence of the discharge, for it could obviously have been avoided by changes in water or other ballast or by shifting cargo. It was the master's duty, as the trial Judge expressed it, to take care "subsequently that no changes of loading should bring the ship down by the head" (p. 47). He failed in that duty, with the result that the ship was put into a condition dangerous to the cargo she had on board.

(b.) The failure properly to regulate the trim was not a fault in stowage.

The learned District Judge was of opinion that since the manner in which the vessel was originally stowed, furnished the reason why she ought not to be allowed to get by the head, the maintenance of her trim in a subsequent *discharge of cargo* (which he called a change in loading) became a part of the loading and stowage, and that a subsequent faulty trim related back and partook of the nature of a fault in stowage. He said that "the wool should not have been stowed forward of the wet sugar, unless care was taken in the other loading, and in all subsequent changes in the loading to see that the ship should not get down by the head" (p. 46) and that "the negligence consisted *in stowing the wool far forward*, without taking care *subsequently* that no changes of loading should bring the ship down by the head" (pp. 46-7).

It can hardly be, however, that that which was not want of prudence in stowage at the time of loading the wool, could become such afterward by virtue of later occurrences.

On the other hand, if the real negligence oc-

curred at a subsequent period of the voyage, such negligence cannot be transformed into a lack of care in stowage upon the theory that it was the manner of stowage which made necessary the subsequent preservation of trim. The law distinguishes only between stowage which is proper and stowage which is not proper. If the cargo was originally stowed in a proper manner, so that there was no reasonable ground to apprehend damage, it can make no difference whether it was stowed in one way or in another. The subsequent damage from a cause other than stowage, has no legal relation to the method of stowage adopted. The stowage was all right so long as the ship was kept in the right trim, *i. e.*, properly managed as the carrying vehicle. The case would be the same as if the wool were stowed in a compartment by itself, and could not be damaged unless the ship heeled over far enough to bring water or cargo drainage (The *Etona*, 64 Fed., 880, 38 U. S., App. 50), down her hatches. If such a vessel were permitted to capsize while discharging by taking out all the cargo on one side first, it would seem that the Court must say, if the principle applied below be correct, that the stowage was negligent, and that the negligence consisted in stowing the wool in the most suitable place in the vessel without taking care subsequently that the ship should not tip over.

Indeed, if wool in a forward hold were injured by collision, due to a wrong order given to the helm, would not the same argument prove that to be a fault "in stowing the wool far forward without taking care subsequently" that collision should not occur? The question in both cases must be whether the injury should reasonably have been anticipated from the stowage; if not, the fault is not in stowage, but in a subsequent and different kind of lack of care.

(c.) A negligent alteration of trim is a fault of management within the Harter Act.

It has been argued that the clause of the Harter Act exempting the shipowner for faults in management must receive a restricted construction, so as not to conflict with the more particular provisions of those clauses which forbid the insertion of agreements in bills of lading, purporting to relieve shipowners from liability for faults in stowage and delivery. It is conceived, however, that if there is any conflict, the exemption of faults in management, which is explicit, must prevail over the other clauses which bear on the shipowner's liability only by inference. They do not say what his liability is; they only declare that such liability as he has, he shall not diminish. The third section fixes the liability and is dominant. It declares that where the shipowner, having taken all care to provide a proper ship and a proper crew, is not personally at fault, he shall not be made responsible for the dereliction in duty of those to whom he has necessarily and properly committed the management and navigation of his vessel. Unless such damage can be fastened on the person whose act has caused it, it must lie where it falls. The other causes do not cut this provision down. They may give rise to an inference that stowage and loading not affecting the fitness of the ship to carry the cargo are not included within the management of the ship; but nothing more.

For loss arising from mere accident, the act allows the shipowner to relieve himself by agreement as he sees fit. For loss arising from negligence of his agents, the act fixes his liability. It is believed to have been the intent of Congress to absolve the shipowner from liability for failure of his officers or crew in everything connected with seamanship and in the acts customarily performed and things determined by the officers and crew; that is to say, for failure to do properly whatever would fall within the scope of their duties in the course of an ordinary voyage, from the time the cargo comes on board until ready for delivery at its

port of destination. This would include the regulation of the trim of the vessel, so far as that affected her fitness to carry the cargo, as well as the use of any of her appliances in the ordinary course of the voyage. In the short definition of "management" given by the Court in the *Silvia*, 171 U. S., 462, 466, this much seems to be determined. Mr. Justice Gray there said:

"This case does not require a comprehensive definition of the words 'navigation' and 'management' of a vessel within the meaning of the act of Congress. *They might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo.* But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas; and if there was any neglect in not closing the iron covers of the ports it was a fault or error in the navigation or in the management of the ship. This view accords with the result of the English decisions upon the meaning of these words (*Good* v. *London Steamship Owners' Association*, L. R., 6 C. P., 563; *The Warkworth*, 9 Prob. Div., 20, 145; *Carmichael* v. *Liverpool Shipowners' Association*, 19 Q. B. D., 242; *Canada Shipping Co.* v. *British Shipowners' Association*, 23 Q. B. D., 342; *The Ferro* (1893), Prob. 38; *The Glenochil* (1896), Prob. 10)."

For similar definitions in the lower courts see *The Sandfield* (79 Fed., 371; 61 U. S., App., 385); *The Mexican Prince* (82 Fed., 484; affirmed by the Circuit Court of Appeals, Second Circuit, on the opinion of the District Court, January 26, 1899); *The British King* (89 Fed., 872, 874).

In *Lawrence* v. *Minturn*, 17 How., 100, Mr. Justice CURTIS said:

"As the quantity of lading and the consequent *trim* and seaworthiness of a vessel are matters as to which the master is, generally speaking, bound to exercise his skill, and over which he is intrusted for the benefit of all concerned with a supervision, his failure to do so properly is negligence for which the owner may be liable."

For that reason it was considered that under an allegation of carelessness of the master a cargo owner might show overloading of the vessel. In the *Argo*, Swabey, 462, 464, Dr. Lushington stated that the trim of the ship was within the province of the master. The trim determines the fitness of the ship, not only for the proper drainage of all leakages aft (vessels being built, universally, so that everything shall flow aft (p. 20) to pumps and wells), but also for purposes of navigation, it being recognized that vessels neither steer nor steam so well, when down by the head. Seeing that the ship has the right trim for either or both purposes seems therefore to belong primarily to the management of the ship, although in a secondary sense it may relate to or affect the cargo.

In the *Rotherfield*, 8 R. I. D. M., pp. 102, 104, the Marseilles Tribunal of Commerce, in construing an exception in an English bill of lading which exonerated a shipowner from responsibility for the faults of pilots, officers and crew in the "management or navigation of the ship," defined the word "management" as follows:

"The expression 'management' used by the parties should be interpreted in the sense which is especially attached to it in the language used by the parties in their contract. The tribunal has already had occasion to define the meaning of that expression. In the English language it has not the signification and the general scope which are attributed to it by the defendants. It refers only to the purely technical acts which the master has to perform, in that capacity, for the nautical direction to the ship, for all the manœuvring operations appertaining to her management (conduite) at sea, *in port*, or at anchorage, *to the proper stowage of the merchandise for the stability of the ship, and to the ballasting*, in a word, to all that concerns nautical art that is to say, to the navigation, properly so-called, and to keeping the ship afloat (la bonne tenue à flot du naivre)."

In the *British King* (*supra*), damage to cargo caused by the failure to take soundings to ascertain the extent of a known leak and to make use of the pumps to keep the water that leaked in away from the cargo, was held to be due to a fault in management. In the *Sandfield* (*supra*), damage resulting from the failure to open the sluce drains in heavy weather, and thus free the bilges from leakage, which, owing to such failure, overflowed the cargo floor and damaged the cargo, was also held to be due to fault in management.

In the *Etona* (64 Fed., 880; 38 U. S. App., 50), the ship was exonerated from liability for damage by sugar drainage to another part of the cargo, owing to the ship taking a list in consequence of a fault in navigation or in the management of the ship. In that case, wet sugar was stowed in the between-decks, and dry hides in the lower hold. The between-deck hatchway leading into the lower hold was protected by a coaming about a foot in height. The vessel was improperly anchored at Para, in consequence of which the current in the Amazon caused her to drag her anchor, to take the ground, and list over to such an extent that the drainage in the between-deck overflowed the coaming and damaged the hides underneath. The stowage of the sugar in the between-deck was proved to be proper, and the loss was ascribed to faults in navigation or management, upon a finding that at the time the cargo was stowed there was no reason to apprehend that the vessel would take such a list as would permit the drainage to overflow the coaming.

The principle there applied fits the present case. At the time the wool and the sugar were stowed, there was no reason to apprehend that the vessel would get down by the head, so that the drainage would flow forward instead of aft. The Court has found that the sugar was stowed with the design that the drainage should flow aft and down the scuppers, located at the back end of the between-deck. The negligence in allowing the ship to get

down by the head so that the drainage flowed forward in a direction not designed and not anticipated at the time of the stowage, was as much a fault in management as the negligence in the case of the *Etona*, which resulted in the drainage flowing sidewise and over the coaming, and causing the same kind of damage.

In *The Glenochil* [1896], Prob., 10, it became necessary during the discharge of cargo at the port of destination to stiffen the ship, and for this purpose water was run into a ballast-tank, and because of the damaged condition of a sounding pipe and its casing due to heavy weather on the voyage, that part of defendant's cargo still in the hold was damaged. The omission to ascertain the condition of the sounding pipe was negligence. The bills of lading incorporated, by reference, the provisions of the Harter Act. It was *held* that the word "management" extended to operations, during discharge at the port of destination as well as at sea; that the stiffening of the ship by means of the ballast tank was an act of management; and that the failure to ascertain the condition of the sounding pipe was a fault in management for which the ship was not liable.

In *The Ferro* [1893], Prob., 38, where a bill of lading contained an exemption for loss from any act, neglect or default "in the management or navigation of the ship," and it was held that stowage without sufficient dunnage was not within the exemption, Sir Francis Jeune said at page 45:

> "It is not difficult to understand why the word 'management' was introduced, because inasmuch as navigation is defined as something affecting the safe sailing of the ship in the case I have referred to, it is easy to see that there might be things which it would be important to guard against connected with the ship itself, and the safe management of the ship, which would not fall under navigation. Removal of the hatches for the sake of ventilation for example might be management of the ship, but would have nothing to do with the navigation."

In *The Glenochil* (*supra*, at p. 16) the same learned Judge said:

"It may be that the illustration I gave in that case (*The Ferro*) as to the removal of the hatches for the sake of ventilation was not a very happy one, but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo, and want of care of vessel, *indirectly affecting the cargo.*"

In *Dobell & Co.* v. *S. S. Rossmore Co.* (1895), 2 Q. B., 408, A. L. Smith, L. J., said, at page 47:

"It is not necessary to decide what is the interpretation of the expression 'faults or errors in navigation or in the management of the vessel.' I may say, however, that I think that the meaning of the section is that if the shipowner by himself or his agents uses due diligence to make the ship seaworthy, when she starts, he shall not be liable for what happens afterwards when the ship is at sea, and he has no more control over her."

It seems clear that there may be acts constituting management of the vessel in port as well as at sea, as was decided in the case of *The Glenochil* (*sup.*), and that for such acts of management as are under the control and form a part of the duty of the officers of the vessel it is the intention of Congress that the owner shall not be liable. The preservation of a vessel's trim is a part of the duty of her master in respect to his care and oversight of the vessel, and constitutes a part of her management.

If the change of trim had been designedly produced by filling ballast tanks, to steady the ship, the appellant would not have been liable, under the rule laid down in the *Glenochil* (*supra*) for resulting damage to the wool. If so, a negligent omission to steady the ship by means of the ballast tanks, or otherwise, would equally have been a fault of management; and a failure to trim her properly, so long as it was the *trim of the ship*, and not of the cargo that was involved, would stand on the same ground.

(**d.**) Whether an act or omission constitutes a fault in management depends on the nature of the thing done or omitted, and not on the purpose of the man who does it, or the means he takes to accomplish it.

The District Judge distinguished the case of *The Glenochil* (*sup.*) upon the grounds (1) that the act done was primarily for the benefit of the ship and not of the cargo; and (2) that it was done with ship's appliances (p. 47). It would seem, however, that that case should not have been differently decided if the purpose of filling the tank had been to benefit the cargo by bringing the ship down nearer to the wharf, so as to facilitate the discharge, as in *The Glenmavis*, 69 Fed. Rep., 472. In either case, the primary effect of the act would be upon the ship, and it would affect cargo only through affecting the ship. If a change in the ship designed for the ship's benefit is management of the ship, it must equally be management, though designed for the benefit of the cargo.

It is difficult to see what object the framers of the Harter Act could have had in providing that the owner of a vessel should be liable for the negligent manner in which a master filled a ballast-tank, provided he intended to benefit the cargo by it, and not liable, if he did it intending to benefit the vessel; or what the rule of liability should be if it were intended both to stiffen the vessel and to bring her down in the water, so that cargo could be delivered to the wharf from a lesser elevation.

The whole voyage and everything done in the prosecution of it is for the benefit of the cargo as much as of the ship. As Sir Francis Jeune said in *The Glenochil* (*supra*, at p. 15), "In a secondary though not in a primary sense, any mismanagement of the ship, in navigation or otherwise, is a want of proper care as regards the cargo."

If an alteration of the vessel's trim by means of ballast tanks is an act of management, an alteration

effected by any other means, or without the use of the ship's appliances, as by shifting cargo, is an act of management of the vessel, because it relates primarily to the vessel. And a negligent omission to correct an improper trim, is a fault of management equally whether the trim should have been corrected by using ballast tanks or by shifting cargo, or by any other method whatever.

(**e**.) The proximate cause of the damage was the improper trim of the vessel.

If the foregoing remarks are well-founded, it is immaterial that the reason why the vessel should not have been permitted to get out of trim was the likelihood of damage to cargo, or that her improper trim was not the result of a misuse of ship's appliances. An improper trim for the cargo as stowed being a fault of management of the ship, the question is, whether such fault caused the damage, or whether it should be attributed to some other cause.

Here again, for illustration, recourse may be had to the extreme case supposed above of a vessel so lightened by the discharge of cargo at one side as to admit water at the other. It is the improper trim which directly produces the damage. It may be true that the consequences of the faulty trim might have been avoided by a restowage of cargo, but so in *The Silvia* (*supra*), the consequences of leaving the port open might have been avoided by taking cargo from the compartment. Even if it had appeared in that case that spreading a tarpaulin over the cargo would have kept it dry, it is believed that the negligence would still have been considered to lie in the omission to close the port, and it would have been held: *first*, that that omission was negligent, because damage to cargo, though not to ship, was likely to result; *secondly*, that in a legal sense the negligence consisted in that omission alone, since the necessity for

spreading the tarpaulin arose only in consequence of it, and lasted only while the omission to close the port continued. So, in the case at bar, the omission to preserve the ship's trim by the stern was improper, because of the likelihood of damage to cargo; and even if such damage might have been avoided by shifting and restowing the wool before the sugar drainage reached it, the damage to the wool is not to be attributed to a failure to protect the wool against the sugar drainage, but solely to the improper trim of the ship by which the injury was directly produced.

Last Point.

The decrees of the Circuit Court of Appeals for the Second Circuit and of the District Court for the Southern District of New York should be reversed, and the causes remanded to said District Court, with instructions to dismiss the libels, with costs.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Respondent-Appellant.

J. PARKER KIRLIN,
Advocate.

Dated New York, April 6, 1899.

APPENDIX A.

HARTER ACT.

(NOTE.—Italics indicate parts changed by amendments in the passage of the bill.)

HOUSE BILL 9176.

A BILL relating to contracts of common carriers and to certain obligations, duties and rights in connection with the carriage of property.

Be it enacted, etc., That it shall not be lawful for *any common carrier* or the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care in transport, or proper delivery of any and all lawful merchandise or property committed to its or their charge, *nor shall it be lawful to limit its or their liability to less than a full indemnity to the legal claimant for any loss or*

[PUBLIC—No. 57.]

AN ACT relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lad-

damage therefrom, and any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2 That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligation of the owner or owners of said vessels *to* properly equip, man, provision, and outfit said vessel, and make said vessel seaworthy and capable of performing her intended voyage, or *any covenant or agreement* whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened or avoided.

SEC. 3. That if any vessel transporting merchandise or property *between* ports in the United States of America *and foreign ports* shall, *on starting on her voyage, be* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent *or master* shall become or be held responsible for damage or loss resulting from *error of judgment* in navigation or in the management of said vessel, ing or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to exercise due diligence*, properly equip, man, provision, and outfit said vessel, and *to* make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

SEC. 3. That if *the owner* of any vessel transporting merchandise or property *to or from any port* in the United States of America shall *exercise due diligence to make the said vessel* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, *or charterers* shall become or be held responsible for damage or loss resulting from *faults or errors* in navigation or in the manage-

if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery, nor shall the owner or owners, *the vessel,* or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies, *or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, agent, manager, or other authorized person to issue to shippers of any lawful merchandise a bill of lading or shipping document stating the marks, packages, or quantity and apparent condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and the voyage, or ports at which such vessel is intended to touch, and such document shall be evidence of the responsibility of the vessel for the merchandise therein described.*

ment of said vessel nor shall the *vessel,* her owner or owners, charterers, *agent,* or master be held liable for losses arising from dangers of the sea *or other navigable waters,* acts of God, or public enemies, *or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, masters or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.*

SEC. 5. *That it shall be the duty of the collector of the port in which the vessel is lying to refuse clearance to a vessel from said port if he is informed and is satisfied that the owner, master, agent, commercial carrier, or other person representing such vessel, has issued bills of lading for merchandise or property containing clauses that are declared not lawful by section 1 or section 2 of this act, or if he is informed and is satisfied that the owner, agent, master, or other person representing such vessel, will not issue bills of lading as required by section 4 of this act, for merchandise or property delivered to and received by the vessel for transportation; and the said collector shall withhold clearance papers to said vessel until bills of lading or shipping documents are issued to conform to the said first, second, and fourth sections of this act, or if documents have been previously issued, until they are modified to conform to the requirements of said sections.*

SEC. 6. That this act shall not be held to modify or repeal Sections 4281, 4282 and 4283 of the Revised Statute of the United States.

SEC. 5. *That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States within whose jurisdiction the vessel may be found. One half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.*

SEC. 6. That this act sha
not be held to modify or r
peal sections forty two hu
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and forty-two hundred. a
eighty-three of the Revise
Statutes of the Unit
States, *or any other statu
defining the liability of ve
sels, their owners, or repr
sentatives.*

SEC. 7. That this act shall take effect from and after the 1st day of *September, 1892.*

[Passed the House, amended to read as above, December 16, 1892. 24 Cong. Rec., pp. 147–149, 169.]

SEC. 7. *Sections one and four of this act shall not apply to the transportation of live animals.*

SEC. 8. That this act shall take effect from and after the first day of *July*, eighteen hundred and *ninety-three.*

[Passed the Senate as amended February, 1893. 24 Cong. Rec., 1275. Senate amendments concurred in February 8th, 1893. 24 Cong. Rec., 1342. Approved, February 13, 1893. 27 Stat., 445.]

Appendix B.

JUDGE BOND'S DECISION IN THE ORANMORE, AFFIRMING 24 FED. REP. 922.

EDWARD MORRIS, by Augusta Rieser, His next Friend, vs. Steamer ORANMORE.	In the Circuit Court of the United States for the District of Maryland in the Fourth Circuit. In Admiralty.

This cause having been heard and considered, the Court on this 15th day of December, 1885, finds the following facts and conclusions of law.

FINDINGS OF FACT.

1. Edward Morris, of Chicago, the libelant below, under and in pursuance of the live stock freight contract and the bill of lading, Exhibits A and B, filed with the libel in this case, shipped alive and in apparently good condition, 320 head of cattle to be delivered at Liverpool or Birkenhead, England, as provided by said contract and bill of lading.

2. By the said contract and bill of lading the shipper was to provide sufficient attendants, ropes. bedding, food and necessaries for the care and use of the cattle, and the steamer was to provide stalls or pens for the cattle. The steamer provided stalls or pens for the cattle and fittings as required by the contract and bill of lading. The shipper did not provide a sufficient number of men for the care of the cattle, nor a sufficient quantity of bedding, nor sufficient or proper ropes for the safe transportation of the cattle.

3. By the negligence and inefficiency of the foreman of the cattlemen and his assistants, and by the want of proper and sufficient bedding and ropes sixty-seven of said cattle died in the course of the voyage to Liverpool.

4. The cattle fittings on the *Oranmore* on the said voyage were properly constructed in accordance with the provisions of the contract and bill of lading and were approved and passed as good and sufficient by the inspector of underwriters interested in the ship and all the cargo except Morris' cattle. Morris did not insure his cattle for said voyage and Morris accepted the fittings then on the steamer.

5. The 16th article of the live stock freight contract contained the provision that any questions arising under that contract or the bill of lading against the steamer or her owners were to be determined by English law in England.

6. By the English law all the provisions of the live stock freight contract and the bill of lading were lawful and valid.

CONCLUSIONS OF LAW.

1. The loss having been caused by the default of the libelant and his agents the libel must be dismissed, with costs.

2. The English law governs the case.

3. Under the provisions of the live stock freight contract and the bill of lading, the steamer and her owners are free from liability for the losses sustained by the libelant and the libel must be dismissed, with costs.

HUGH L. BOND,
Ct. Judge.

UNITED STATES OF AMERICA, } to wit:
District of Maryland, }

I, JAMES W. CHEW, Clerk of the Circuit Court of the United States for the District of Maryland, do certify that the foregoing is a true copy of the findings of fact and conclusions of law filed in the above entitled case of Edward Morris, &c., vs. steamer *Oranmore*, in said Circuit Court, on the 15th day of December, 1885.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of said Circuit Court this sixteenth day of March, A. D. 1899.

[SEAL.]

JAS. W. CHEW,
Clerk.

No. 507. No. 84. 82

Brief of Myndersa for Re

Filed Nov. 15, 1894.

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NO
JAMES H

Supreme Court of the United States.

BOTANY WORSTED MILLS,
Libellant,

Against

JAMES KNOTT,
Respondent and Petitioner.

HENRY P. WINTER AND CHARLES F. SMILLEY,
Libellants,

Against

JAMES KNOTT,
Respondent and Petitioner.

507

Brief for Libellants in opposition to Petition for Writ of Certiorari.

The libellants call attention to the following circumstances:

First. The stipulation providing for the application of the law of the flag is not valid, (**a**) in being opposed to the public policy of the United States; (**b**) in being linked with unreasonable provisions for the forwarding of the cargo upon unnamed and undesignated steamers, and providing for the application of the law of the *carrying* steamer.

Second: Even if the law of the flag of the *Portuguese Prince* should be applied, the loss would not fall within any of the exceptions of the bill of lading. The exceptions relate to loss through contact with and leakage from the goods of a shipment affecting *other goods of the same shipment;* whereas these goods were damaged by leakage from *other shipments.*

Third: The cases do not fall within the reach of the Harter Act, (**a**) because the bill of lading is a flagrant violation and defiance of the Act; (**b**) because the negligent act related to the preparation of the steamer in port for sea, when the vessel was within the reach and control of her owners.

Fourth: The amounts of damage are very small, the decree in the first case being about $1,200, and in the second case about $500.

Fifth. The points above suggested are elaborated in the briefs used by libellants' counsel in the Circuit Court of Appeals, hereto appended.

WILHELMUS MYNDERSE,
Proctor for Winter and Smillie.

LAWRENCE KNEELAND,
Proctor for Botany Worsted Mills.

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

HENRY P. WINTERS AND CHARLES F. SMILLIE,
Libellants and Appellees

against

JAMES KNOTT,
Respondent and Appellant.

Brief for Libellants, Winters and Smillie.

The libellants were consignees of thirty-nine Bales of Wool shipped on the steamer *Portuguese Prince* at Buenos Aires for delivery at New York. The bales were shipped in good order, but when delivered to the libellants in New York, thirty-seven bales had been damaged by drainage from sugar.

The libellants filed a libel against the respondent James Knott, as the owner of the steamer, to recover the amount of damage to the wool, and their libel was sustained and a decree was entered in their favor. Another shipment of wool, consigned to the Botany Worsted Mills, was damaged to the extent of fifty-two bales, and a libel was filed by the Botany Worsted Mills in respect to such damage. That libel also was sustained.

The actions were tried together in the District Court, and from the decrees entered in the District Court, the ship owner has appealed.

The *Portuguese Prince* was a British steamer, and belonged to the Prince Line. This line traded between New York,

Brazil and the River Plate, touching at some islands of the West Indies. The Line had resident agents in each port, and a resident Superintendent in New York *(Saunders fols. 149, 152.)* It was established in 1892, and its steamers were carriers of general merchandise, receiving and delivering cargo at each port. *(Saunders 151, 153, 155)*

The advertisements of the steamers were under the general name of the Prince Line.

The sugar, from which the drainage came, and also both consignments of wool, were stowed in the between decks forward of the engine room. This compartment was about eighty feet in length, and about thirty-four feet wide. *(Saunders fol. 146.)*

The compartment was, on this voyage, divided by a transverse temporary wooden bulkhead, which stood about in line with the foremast, and divided the compartment about equally. *(Saunders, fols. 107, 148.)* The dividing bulkhead was not a part of the original construction of the vessel but was movable, and in fact was moved about to suit the convenience of cargo. *(Saunders fols. 155, 156.)* There were doors in it. *(Saunders fol. 112.)*

The wool was stowed in the division which was forward of the temporary bulkhead, and ran from the forward part of the compartment to within ten feet of the temporary bulkhead. *(Saunders, fol. 107.)*

The bales were stowed on end, ni e in a row, and from the size of the bales there must have been about ninety in that compartment. *(Saunders, fol. 110.)* There were eighty-nine bales damaged, and Mr. Saunders is therefore in error when he says only three rows were damaged. (Saunders fol. 134.) The wool appears to have been dunnaged. (Saunders fols. 109, 110.)

After leaving Buenos Aires, the steamer proceeded to Santos, Rio, Bahia, and Macio and then to Pernambuco, at which port two hundred tons of crude green sugars were put in the between decks abaft the temporary bulkhead. *(Saunders, fol. 108.)* On arriving in New York the sugars did not reach close up to the temporary bulkhead there being about twenty five feet of vacant space. *(Saunders, fols. 108, 112.)* This may have been due to some of the sugars being removed from that compartment at Trinidad. *(Saunders fol. 113.)*

The sugars were wet and were expected to drain heavily, (Saunders fols. 108, 116, 126, 133.) They were a kind a character of cargo ordinarily taken by the steamers of the line. *(Saunders, fol. 155.)*

The construction of the *Portuguese Prince* was such that if she were on an even keel the drainage would run aft. If she was trimmed six inches by the head, the drainage would still run aft so long as she was stationary, but moving through the water she would, in such trim, and with her natural tendency to dip, carry the drainage forward. *(Saunders fol. 125.)*

When the steamer left Pernambuco, after loading these sugars, she left port trimmed ten inches by the stern and upon arrival at Para, which is the next port, she was still trimmed by the stern. *(Exhibit D, fols. 170, 171.)* She lay at Para ten days discharging cargo, and when she left Para she was trimmed two feet by the head. *(Exhibit D fol. 171.)* She carried this trim upon arrival at the next port, Trinidad, but during her two days stay there, her trim was corrected, and when she left that port she was trimmed one foot by the stern. *(Exhibit D fol. 171.)*

It has been formally admitted that the wool was damaged by drainage finding its way forward through the temporary bulkhead at Para, or between Para and the Port of Spain, the drainage being carried forward by the trim of the vessel *(Exhibit A fol. 167.)*

POINTS

First :

THE HARTER ACT DOES NOT RELIEVE THE SHIP OWNER.

The first section of that Act prohibits the insertion in a bill of lading, of any clauses, covenants, or agreements, relieving the manager, agent, master or owner of any vessel transporting merchandise between ports of the United States and foreign ports, from liability for loss or damage through negligence or omissions in loading, stowing, *caring for* and deliv-

ering cargo, and declares that all such clauses shall be null and void.

The second section prohibits the insertion in any bill of lading, of a covenant or agreement whereby are lessened, weakened or avoided the obligations of an owner to make his vessel seaworthy, or the obligations of a master, or agent to carefully handle and stow and *care for* and deliver cargo.

The third section relieves the ship owner who has exercised due diligence, from responsibility for damage resulting from faults or errors in navigation or management of the vessel.

The Act must necessarily be construed as a whole and the stringent provisions of the first and second sections indicate that the responsibility is left upon the owner of properly stowing and "caring for" the cargo, and that he is relieved from responsibility for damage to cargo only when it comes through navigation and management of the vessel when she is at sea and beyond his control. It is not enough that the cargo is originally properly stowed. The obligation upon the owner is a continuing one. He cannot be relieved from responsibility for the "custody" or "care" of the cargo. *(Section 1.)* Nor can he relieve himself from obligation to "care for" it. *(Section 2.)*

These provisions contemplate not only that the cargo shall be well stowed originally but that due provision shall be made from the outset and shall be continued wherever practicable to maintain it in safety.

When the entire cargo of a vessel is taken at one port, the cargo must at least be properly stowed at the time it leaves port, and it must have all proper surroundings for its protection through the voyage.

When the cargo is loaded in partial lots at successive ports the obligation of good stowage is a recurrent one arising at every port.

It may be admitted that the wool was put on at Buenos Aires suitably dunnaged, to protect it from the dangers then existing. We urge, however, that the owner failed in his duty when, at Pernambuco, he placed substantially in the same compartment with the wool, two hundred tons of wet sugars, with full knowledge that such sugars would drain and that the cargo of wool was protected in respect to such drainage only by the temporary trim of the vessel by the stern. The bulkhead be-

tween the wool and the sugar was no protection, and it was not intended to be a protection. So far as it afforded any appearance of protection to the wool, it was a delusion.

The owner, the master, and the agent all knew that the bulkhead was only temporary in its character, and that it was shifted from place to place to meet the emergencies of loading, and that it had doors.

They were bound to contemplate that through the pitching of the vessel at sea, the sinking of her head while ploughing through the waters, *(Saunders fols. 125, 126)* or by the shifting of weights through receipt or discharge of cargo at later ports, the trim would be from time to time changed, and that thereby the drainage might be thrown forward.

It was negligent stowage to place the wet sugars in close proximity to the wool, with no other protection for the wool, than the temporary trim of the vessel.

It happened that no damage came to the wool at Pernambuco, nor until after arrival in Para ten days later. While at Para the trim of the vessel was so changed, through discharge of cargo, as to send her out from that port nearly two feet by the head, which trim was subsequently maintained for six days, and until after reaching Trinidad *(Exhibit D fols. 170, 171.)*

If the word "seaworthy" relates purely to the condition of the hull, it must certainly relate to the condition of the hull for the purpose of its contemplated use In that aspect, the bulkhead did not make the vessel seaworthy from the transportation of wet sugars and dry wool in the forward between decks.

But unseaworthiness may relate to a condition of loading as well as to a condition of the hull.

Carver Carriage by Sea, Second Edition, Section 18.

The stowage of the wool and the responsibility of the owner in respect thereto was not disposed of by putting the bales in a dry place, and fairly dunnaged at Buenos Aires. The stowage of the wool was changed at every port, not by physical removal of the wool, but in its surroundings.

Certainly it could not be said that the ship owner had discharged his responsibility in respect to the stowage of the wool by putting it on a dry deck well dunnaged at Buenos Aires, if at the next port he had put on it wet and draining cargo

The position of the shipowner under the Act is stated in the *Silvia*—

" Read as a whole, the purpose of the Act manifestly is on " the one hand in the interest of the public to prevent carriers " from evading responsibility, to exercise due diligence in " providing seaworthy vessels and in handling and *care* of " cargo; and, on the other hand, whenever they have exer- " cised due diligence in these respects, to absolve them from " liability for losses arising during the transport from the perils " of the sea and from fault or errors in the navigation or man- " agement of the vessel."

The Silvia 68 Fed. Rep. 230, 233.

The present case differs from that of the *Etona, 71 Fed. Rep. 895;*—In that case the list was given to the vessel through negligent stranding and while in charge of a pilot, while the *Portuguese Prince* took her trim while in a port, a place where the shipowner was represented by an agent. She took a trim which might have been contemplated and which could have been corrected either by the use of her water ballast tanks or by a re-arrangement of cargo. *(Saunders, fols. 128, 129).*

Recent English cases are fully discussed in the opinion of the District Judge;—

The Glenochil (1896) Probate Division 10.
The Ferro (1893) Probate Division 38.
See also *Dobell against S. S. Rossmore Company, (1891) 2 Q. B. 408.*

In this latter case the ship owner was held to be responsible for due diligence on the part of himself and his agents " to make the ship seaworthy *when she starts.*"

Second

THE SHIP OWNER IS NOT RELIEVED BY THE PROVISIONS OF THE BRITISH LAW.

Exemption is claimed by him under the clause of the bill of lading which provides, ;—

" This contract shall be governed by the law of the flag of " the ship carrying the goods."

The ship owner claims that the law of the flag is the British law, and that by such law, the clause exempting him from responsibility for stowage is valid.

But by the first section of the Harter Act, the exemption clauses relied upon are declared null and void, and there is materially nothing therefore upon which the British law, if applicable, can take effect. The stipulation, however, for the application of foreign law is invalid.

Lewisohn vs. National S. S. Co, 56 Fed. Rep. 602 ;
The Silvia, 68 Fed. Rep. 230, 231 ;
The Glenmavis 69 Fed. Rep. 472, 476–
The Brantford City, 29 Fed. Rep. 373, 396 ;
The Hugo, 57 Fed. Rep. 403, 411 ;
The Etona 64 Fed. Rep. 880 ;
The Guildhall 58 Fed. Rep. 796 ;
The Energia 56 Fed. Rep. 124, 127 and 66 Fed. Rep. 604 ;
The Iowa 50 Fed. Rep. 561.

The bills of lading show that the steamers of the Prince Line at times ply to or carry cargo destined for the United Kingdom of Great Britain It may be that as to such cargo the stipulation would be valid.

If the Harter Act is not considered controlling then the provisions of the bill of lading should be determined by the standard of what is "just and reasonable in the eye of the law."

Railroad Co., vs. Lockwood, 17 Wallace, 357, 380, 382

While it might be "just and reasonable" to apply the British law, under a properly framed stipulation therefor, in respect to cargo destined for England, it is not "just or reasonable" to make it applicable to the transportation of cargo from South America to the United States, there being no proof that the law of the country where the shipment was made recognized an exemption from the consequence of negligence as valid while the law of the port of destination is declared against it.

The stipulation for the law of the flag does not, moreover,

fairly and explicitly introduce the British law. The bill of lading provides ;—

" The company reserves the liberty *before shipment* or at " any subsequent period, and so often as may for any cause " be deemed expedient at any place to ship the whole or any " part of said goods by *any other steamer* or vessel *whether* " *belonging to the company or not.*"

And then provides ;—

" This contract shall be governed by the law of the flag of " the ship *carrying* the goods."

It cannot be said that a shipper, receiving such a bill of lading, has made an enforcible stipulation for the application of British law. The bill of lading does not specify the law of any named nation. While shipment was contemplated on a British vessel, the right was reserved to the shipowner, *before shipment* or afterward, of shipping the cargo on any other steamer, of any owner, and of any flag, without notice to the shipper. The shipper could not know the nationality of the *carrying* vessel and cannot be deemed to be bound to the law of its flag.

Such a stipulation is not "just and reasonable in the eye of the law."

Third

THE DECREE OF THE DISTRICT COURT SHOULD BE AFFIRMED, WITH INTEREST AND COSTS, AND A MANDATE SHOULD ISSUE ACCORDINGLY.

BUTLER, NOTMAN, JOLINE & MYNDERSE
Proctors for Libellants

WILHELMUS MYNDERSE.
Advocate.

U. S. CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

BOTANY WORSTED MILLS,
Libellant and Appellee,

vs.

JAMES KNOTT,
Respondent and Appellant.

BRIEF FOR APPELLEE.

Statement.

This is an appeal, by the respondent, from a decree of the District Court for the Southern District of New York, in admiralty, awarding the libellant $1,191.54 (including costs) for damages to cargo shipped on the steamship *Portuguese Prince* belonging to the respondent.

The facts connected with the shipment of the cargo and the cause and extent of the damage are not disputed, the question presented by the appeal being whether, upon the admitted facts, the respondent is exempted from liability for the damage, by reason of the exceptions in the bill of lading, or by the provisions of the third section of the Harter Act.

The libellant shipped 122 bales of wool, at Buenos Ayres, on the steamship *Portuguese Prince* in December, 1894, to be transported to New York. On

arrival, on March 30th, 1895, 52 of these bales were found to be damaged by sugar drainage, the damage amounting to $1,049.31.

It is admitted that the vessel was a common carrier (95) running in a line called the Prince Line, and trading regularly between the port of New York and the various ports in the Brazils and River Plata, carrying the products of those countries, and that in each of said ports there was a resident agent of the line, who made contracts for cargo and attended to its delivery and the collection of freight (150-152).

The libellant's wool, together with other wool belonging to the libellants, Winter & Smillie, was stowed in Number 1 between decks, about ten feet forward of a temporary wooden bulkhead which was not tight (Stipulation, p. 42). This bulkhead had been on the ship for some time and was moved about to suit the convenience of the cargo carried. The vessel left Buenos Ayres on December 12th, 1894, and proceeded to Santos, Rio, Bahia, Macio, Pernambuco, Para, Port of Spain, and thence (after calling at two other ports), to New York. At each of these ports cargo was taken in or discharged.

At Pernambuco, where the vessel arrived February 19th, 1895, wet sugar, from which there is always drainage, was stowed in the Number 2 between decks, aft of the temporary wooden bulkhead, which separated it from the wool.

The between deck was provided with scuppers, for carrying the drainage to the bilges, provided such drainage ran aft, as it would do when the vessel was trimmed by the stern, or on an even keel in smooth water. There was no provision for carrying off the drainage in case it ran forward.

The vessel left Pernambuco on February 24th, slightly by the stern (171) and proceeded to Para where she discharged a part of her cargo. On leaving that port on March 10th, she was trimmed *two feet by the head* (171). She proceeded to Port of Spain, where she loaded cargo, and proceeded on her voyage on March 18th, being then trimmed on

foot by the stern (171). It is admitted that there was no damage to the wool from sugar drainage until the ship was trimmed by the head at Para; that the wool was damaged by the sugar drainage finding its way through the bulkhead and reaching the wool at Para, or between Para and Port of Spain, and that after the ship was again trimmed by the stern at Port of Spain, no sugar drainage found its way to the forward between decks (Stipulation, p. 42).

The defenses interposed are (1) that by the bill of lading "negligence of master and mariners * * * and all damage arising from the goods by stowage, or contact with, or by sweating, leakage, smell or evaporation from them * * * however caused or otherwise howsoever * * * or any other peril of the seas, rivers, navigation * * * of whatever nature or kind, and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom be occasioned by the wrongful act, default, or error in judgment of the owners, masters, officers, mariners, crew, stevedores, engineers and other persons whomsoever in the service of the ship * * * and whether before, or after or during the voyage" excepted. "This contract shall be governed by the law of the flag of the ship carrying the goods."

The answer further alleges, "if the different portions of the cargo were improperly stowed with reference to each other, then the said damage is within the exception of stowage and damage arising from the negligence of the officers, servants or stevedores of the vessel" (32).

(2) That the damage to the wool was due to "fault or error in the management or navigation of the vessel," and is within the exception of the third section of the Harter Act.

POINTS.

The Exceptions in the Bill of Lading.

I.

The language of the exceptions does not cover a loss resulting from stowage or contact with or leakage from other goods.

The principle is well established that in construing exceptions in a bill of lading, all doubtful language is to be resolved most favorably to the shipper, and that the exemption clause must be expressed so as to cover the precise exemption claimed; and, further, that general words following particularly enumerated exceptions do not extend the exemption to causes not specifically enumerated.

The language of the bill of lading is, "all damage *from the goods* arising by *stowage* or *contact with*, or by sweating, leakage, smell, evaporation *from them*." Whatever was intended to be expressed by this language it is apparent that the words "*from the goods*" must apply to the goods described in the bill of lading, and the words, "*from them*" at the end of the clause, clearly relate and apply to the goods themselves. The language used, therefore, does not cover damage caused by *other goods* than those described in the bill of lading. This appears more clearly by the language of the following clause which does except damage resulting from *certain other cargo*, viz: "Or from the leakage or flow of, or from contact with, the urine, manure, water or drainage of horses, cattle, sheep or other animals carried on the said ship," etc.

II.

The exemption from liability resulting from negligence of the owners is contrary to public policy, and therefore void.

The provisions in the bill of lading are one of the many forms of exemptions for loss caused by negligence, common in English forms of bills of lading, which the Federal Courts have uniformly refused to sanction.

The case falls directly within the rule laid down in

Lewisohn *v.* National S.S. Co., 56 F. R., 602.
The Guildhall, 58 F. R., 796.
The Glenmavis, 69 F. R., 472.

In each of the cases cited the shipment was made and the bill of lading signed in a foreign port, and exceptions almost identical with the one before the Court were held invalid.

The fact that the bill of lading contains the stipulation that the contract shall be governed by the law of the flag, furnishes no sound reason for the adoption of a different rule.

It is true that in the case of the Energia, 66 F. R., 604, Judge Lacombe said :

> " The case of the Montana, however, expressly
> " reserves for future decision cases where the
> " contract itself expressly provides that any
> " question arising under it should be governed
> " by the law of some specified foreign country."

But the question was not considered or decided in that case, since the charter party which was held to constitute the contract between the parties contained no such provision.

As has been pointed out by Judge Butler in the *Glenmavis* (*supra*), and by Judge Nelson in the *Iowa*, 50 F. R., 561, the insertion of the provision

as to the law of the flag is but an indirect attempt to obtain the benefit of the exemption of negligence condemned by our courts as contrary to public policy, by reason of the different rule prevailing in the English Courts.

In the *Glenmavis*, Judge Butler says (476):

> "The stipulation that the parties shall be sub-
> "ject to the laws of England is unimportant, as
> "it adds nothing to the implication which would
> "arise in its absence. The ship bore the English
> "flag, and the laws of Germany where the con-
> "tract was made, as well as those of England,
> "sustain such provisions. That the intent of the
> "parties in this regard is thus expressed is,
> "therefore, immaterial. In every instance
> "where the Courts have declared such stipula-
> "tion void, it has, of course, been against the
> "express agreement of the parties."

In the *Iowa*, 50 F. R., 561, where the bill of lading contained the same stipulation, Judge Nelson said (563):

> "The libellant is entitled to recover in spite
> "of the clause providing that all questions
> "arising under the contract shall be decided
> "according to British law. This seems to be an
> "attempt in an indirect way, to stipulate that
> "the shipowner shall be exempt from responsi-
> "bility for the negligence of his servants, since
> "the British law is supposed to uphold such
> "exemptions."

In the Montana, 129 U. S., 397–441, Mr. Justice Gray said:

> "The carrier and his customer do not stand
> "upon a footing of equality. The individual
> "customer has no real freedom of choice. He
> "can not afford to higgle or stand out and seek
> "redress in the Courts. He prefers rather to
> "accept any bill of lading or to sign any paper,

"that the carrier presents; *and in most cases* "*he has no alternative but to do this, or to* "*abandon his business.*"

It may well be questioned therefore how far the acceptance of a bill of lading containing the provision that the contract shall be governed by the law of the flag, can be considered as evidence of the intent of the shipper and cargo owner, that the English rule as to the right of the carrier to exemption from liability for negligence shall prevail.

III.

The exceptions in the bill of lading relating to stowage, they are in direct contravention of the provisions of the Harter Act and are therefore void.

The first section of the act prohibits the insertion in any bill of lading of any clause or provision whereby the owner "shall be relieved from liability for loss or damage, arising from negligence, fault or failure, in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge" and, by the Second Section of the Act, no covenant or agreement shall be inserted "whereby the obligation of the master, officer, agents or servants to carefully handle or stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided."

In the case of the Silvia, 68 F. R., 230, this Court said (233):

"Responsibility to the cargo owner who sues "in the courts of this country *cannot be cur-* "*tailed in any of the particulars prohibited by* "*the (Harter) Act.*" And

"Read as a whole the purpose of the Act "manifestly is, on the one hand, in the in- "terests of the public, to prevent carriers from "evading responsibility to exercise due dili- "gence in providing seaworthy vessels, *and in* "*the handling and care of the cargo.*"

THE HARTER ACT.

IV.

The damage to the libellant's cargo was the result of fault in "stowage of the cargo," and not in the "management of the vessel."

The argument of the appellant is, that as the sugar drainage could not reach the wool unless the ship was trimmed by the head, the cause of the damage was the faulty trim of the ship, and that the trim of the ship is properly comprised within the term "management of the vessel" as used in the Act.

While there is an apparent plausibility in the contention that the trim of the vessel is a matter which would fall within the term "management," a sufficient answer to this argument appears in the fact that the trim of the ship *alone* had nothing to do with the damage.

Before the change in the ship's trim had been made, the method of stowing the vessel's cargo had been such, that danger existed of damage by the sugar to the wool.

It was the duty of the carrier to use all reasonable care and skill in stowing, to prevent such damage, and the failure to do so is negligence for which the carrier is liable.

Abbott on Shipping, 12 Ed., p. 286:

"And care must be taken by the master

"* * * * * so to stow and arrange the dif-
"ferent articles of which the cargo consists
"that they may not be injured by each other,
"or by the motion or leakage of the ship."

Carver on Carriage by Sea, §95.
The Pharos, 9 F. R., 912.
Mainwaring *v.* The Carrie Delap, 1 F. R., 874.

The fact that the change in trim of the vessel was a *concurring*, or even the *proximate* cause of damage, as claimed by the appellant, ought not to relieve the vessel; for in cases arising under bills of lading, the *efficient*, as distinguished from the concurring or proximate cause of the damage, is looked to, and even when a peril of the sea or other excepted cause is proved, it is competent for the cargo owner to show that proper care in stowage was not exercised; and the loss is then deemed, in the sense of the law, a loss occasioned by the negligence in stowing.

Clark *v.* Bainewell, 12 How., 280.
The Sabioncello, 7 Benedict, 357.

It is not contended by the appellant that if the wet sugar had been stowed at Buenos Ayres, and the ship had left that port by the head, or if both the wool and sugar had been stowed at Para, the damage to the wool would be attributable to anything but negligence in the stowage or care of the cargo.

His argument is that the stowage of the wool at Buenos Ayres was proper; that the stowage of the sugar at Pernambuco was proper, because the vessel was then trimmed by the stern; and that the stowage of the cargo was therefore completed before the change in the trim of the ship took place.

Can the fact that the different cargoes were shipped at different ports and that the change in trim of the vessel occurred at a third port, change the cause of the loss from negligence in

"care of the cargo," to negligence in "management of the vessel"?

If so, in case other cargo had been stowed at Para, in the same compartment with the libellant's wool, under a similar bill of lading, and had suffered damage from the same cause, the owner of such other cargo would be entitled to recover the damage to his cargo, while the libellant would be remediless.

The statement of such a proposition carries its own refutation.

Admitting that the vessel on leaving the port of Para was, in the language of the brief for the respondent in the court below, "*unfitted to proceed with the wool and sugar*" by reason of change in her trim occasioned solely by the loading or discharge of cargo, and without reference to the safety or navigation of the vessel, is a different rule as to liability to be applied, than would be applied if the cargo had been stored at that port?

The object of the Harter Act as interpreted by this Court was to substitute in place of the strict warranty of seaworthiness, the obligation on the part of the owner to use due diligence.

But in the contract of the carrier, prior to the enactment of the Harter Act, was implied not only the warranty of seaworthiness at the commencement of the voyage, but also the stipulation that the vessel should be made seaworthy upon leaving any intermediate port.

> "But in the contract of the shipowner as "carrier is implied this stipulation, that should "the vessel become unseaworthy in the course "of the voyage, he must make her seaworthy, "if there be opportunity, or he must not pro- "ceed further."
>
> Machlachlan, Merchant Shipping, 419.

The intention of the Harter Act is to exempt the

vessel and owner from liability for error or fault after sailing and during the voyage.

Dobell *v.* SS. Rossmore Co. (1895), 2 Q. B., 408, Smith, L. J. (417).

> "I think that the meaning of the section is "that, if the shipowner by himself or his "agents uses due diligence to make the ship "seaworthy when she starts, he shall not be "liable for what happens afterwards *when the* "*ship is at sea and he has no more control* "*over her.*"

The *Portuguese Prince* was trading in a regular line between the several ports of Brazil and the River Plata and New York, and in each of said ports there was a resident agent of the line. What reason can be advanced for holding the owner to a lesser or different responsibility for the acts or omissions of his agents at the port of Para, than would be applied in case the vessel had left either Buenos Ayres or Pernambuco "unfitted to proceed with the wool and sugar?"

The vessel was equally under his control at each of these ports, and the same rule should be applied in determining his liability for faults or omissions of his agents at either of them.

V.

What is comprised within the term "Management of the Vessel."

The learned District Judge held that "where the regulation of the trim of the ship is designedly done and done primarily with reference to the ship, and for the benefit of the ship, or with a view to her sea going qualities," it is within the term management; and that the handling of the ship's

appliances with reference to the navigation or safety of the ship for the purposes of the voyage belong to the management of the ship (250-251).

So in the Sylvia (64 F. R. 607), affirmed by this Court, he held that the failure to close an iron shutter of a port hole was a fault in the management because the neglect consisted in the failure to use the appliances provided by the owner to put the ship in proper condition.

In the *Ferro*, (1893), Probate Division 38, where the bill of lading excepted "damage from any act or default of the pilot, master or mariners in the navigation or management of the ship," it was held that the stowage of rotten oranges with sound ones and placing sound boxes so that their ends rested on angle irons and were broken by pressure was not within the term "management."

Sir Gorrell Barnes, *J.*, said (page 46):

> "I am not satisfied that they (the words "'management of the ship') go much if it all be- "yond the word 'navigation.' Some things "may be suggested to which the word manage- "ment is perhaps applicable beyond that of "navigation."

In the recent case of the *Glenochil* (1896), Probate Division 10, where at the end of the voyage, before delivery of the cargo, it was found necessary in order to stiffen the ship, to fill the ballast tanks, and the sounding pipe and casing had become cracked during the voyage, so that in filling the tanks the water damaged the cargo, it was held that negligence in failing to examine the pipes before filling them was within the Harter Act, because the negligence was in the use of the ship's appliances for the ship's safety and was therefore within the term "management of the ship."

The distinction pointed out by Judge Brown in his opinion in this case was clearly recognized.

Sir Francis Jeune said: "The negligence consisted "in the mismanagement of part of the appliances

"of the ship; a mismanagement which arose be-
"cause it was intended to do something for the
"benefit of the ship, viz., to stiffen her, the necessity
"for stiffening arising because part of the cargo
"had been taken out of her."

In the case before the Court the change in the vessel's trim occurred at a regular port of call and was caused by the discharge of cargo from the after part of the vessel; it was not done for any purpose connected with the sailing or navigation of the vessel, her safety, or the proper completion of the voyage; she was in as seaworthy a condition by the head as if trimmed by the stern; it was not a misuse of any part of the ship's appliances or a failure to use the appliances furnished by the owner and was certainly not a fault in "navigation."

It was neglect in the care of the cargo in the same degree as if for the purpose of obviating the danger of damage to the wool, the cargo had been shifted at the port of Para, as should have been done (Saunders 129), and had been damaged by negligence during the operation.

VI.

The provisions of the first and second sections of the Harter Act control the interpretation to be given to the words "management of the vessel" in the third section, and having specifically prohibited the insertion of provisions exempting the carriers for negligence in the care of cargo and declared such provision, if inserted, null and void, it would violate the intention of the Act, as a whole, to extend the meaning of the words used in the third section to include negligence in the care of cargo.

It is an established principle of construction that a statute is to be construed as a whole, and its different provisions harmonized if possible, and that when particular provisions are contained in it the construction of general words is not to be extended so as to nullify the more particular provisions.

By the first section of the Act the insertion of any provision in a bill of lading, relieving the vessel or owner from "loss or damage resulting from negligence or failure in properly loading, stowage, custody, care or proper delivery of any and all lawful merchandise" is prohibited, and the second section declares it unlawful to insert any provision whereby the obligation of the master, &c, to carefully handle and stow her cargo and to care for and properly deliver the same shall be weakened, lessened or avoided. In the case of the Sylvia, this court held that one of the purposes of the Act as a whole was to prevent carriers from evading responsibility to exercise due diligence "in the handling and care of the cargo."

The attempt, therefore, to include negligence in stowing or care of cargo within the term "management of the vessel," as used in the third section, is manifestly repugnant to the intention of the Act to make the ship and owner responsible for such neglect.

In the *Glenochil*, 1896, Prob. D. 10, Sir Francis Jeune calls attention to the fact that the act is designed to "prevent exemption in the case of direct want of care in respect to the cargo and to permit exemptions in respect to the faults *primarily connected* with the navigation or with the management of the vessel and not with the cargo."

And by Sir Gorrell Barnes that "there will be found "a strong and marked contrast in the provisions "which deal with the cargo, and those which deal "with the management of the ship herself."

The fault which caused the damage in this case was *primarily connected with the care of the cargo*, viz.: the stowage of the wet sugar at Pernambuco

in proximity to the wool, without proper precaution against damage from the drainage, in case it found its way forward; the failure to shift and restow either the wool or sugar at Para, which was entirely practicable, and should have been done (Saunders 129), and leaving Para with the vessel unfitted to carry the wool and sugar safely. Fault in these particulars, it is submitted, are not within the meaning of the words "fault or error in the management of the vessel."

VII.

The decree of the District Court should be affirmed with interest and costs.

BLACK & KNEELAND,
Proctors for Appellees.

LAWRENCE KNEELAND,
Advocate.

No. 32

695

Supreme Court

Of the United States.

Brief of Kneeland for Oct.

32.

Filed Oct. 9, 1899.

OCTOBER TERM, 1899.

Office Supreme Court U. S.
FILED
OCT 9 1899
JAMES H. McKENNEY,
Clerk.

JAMES KNOTT,
Respondent-Appellant,

vs.

THE BOTANY WORSTED MILLS,
Libellant-Appellee.

Brief for Appellee.

BLACK & KNEELAND,
Proctors for Appellee.

LAWRENCE KNEELAND,
Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1899.

JAMES KNOTT,
Respondent-appellant,

vs.

BOTANY WORSTED MILLS,
Libelant appellee.

BRIEF FOR APPELLEE.

STATEMENT.

The above cause comes before the Court by virtue of a writ of *certiorari* directed to the United States Circuit Court of Appeals for the Second Circuit.

The libel was filed in the Southern District of New York to recover damage to certain bales of wool, belonging to the libelant, shipped on the steamship "Portuguese Prince" at Buenos Ayres, in December, 1894, to be transported to New York.

The District Court decreed in favor of the libelant for $1,191.54, which decree was affirmed by the Circuit Court of Appeals.

There is no dispute as to the facts connected with the shipment of the wool or the cause and extent of the damage. It is admitted that the "Portuguese Prince" was a common carrier, running in a line called the Prince line, and trading regularly be-

tween the port of New York and various ports in Brazil and the River Plata, and that in each of said ports there was a resident agent of said line, who made contracts for cargo, attended to its delivery, to the collection of freight and to the vessel's business generally (p. 26).

At Buenos Ayres, between the 21st and 24th of December, 1894, 122 bales of wool belonging to the libelant were shipped on the "Portuguese Prince."

This wool, together with other wool belonging to Winter & Smillie, was stowed in the No. 1 between decks, about ten feet forward of a temporary wooden bulkhead which was not tight (17). This bulkhead had been in the ship for some time and was moved about to suit the convenience of cargo carried (p. 27).

The vessel left Buenos Ayres on December 25th, 1894, and proceeded to Santos, Rio de Janeiro, Bahia, Macis, Pernambuco, Para, Port of Spain, Grenada, St. Lucia and thence to New York (p. 29). At each of these ports cargo was taken in or discharged.

At Pernambuco, where the vessel arrived February 19, 1895, wet sugar, from which there is always drainage (pp. 20, 24), was stowed in the No. 2 between-decks aft of the temporary wooden bulkhead which separated it from the wool.

The between-decks was provided with scuppers for carrying the drainage to the bilges, provided such drainage ran aft, as it would do when the vessel was loaded by the stern, or on an even keel in smooth water. There was no provision for carrying off the drainage in case it ran forward (p. 20). The vessel left Pernambuco on February 24th, loaded slightly by the stern, and proceeded to Para, where she discharged a part of her cargo. On leaving that port on March 10th, she was loaded *two feet by the head.* She proceeded to Port of Spain, where she loaded cargo and proceeded on her voyage on March 18th, being then loaded one foot by the stern (p. 29).

The following stipulation was entered into (p. 28).

> "It is stipulated between the parties as follows: Wet sugar was stowed in No. 2 'tween decks at Pernambuco. There was a wooden bulkhead not tight between this place and the forward or No. 1 'tween decks in which libelant's wool was stowed. There was no damage to the wool from sugar drainage until the ship was trimmed by the head at Para, as shown in the official log, which is offered in evidence. It was damaged by sugar drainage finding its way through the bulkhead and reaching the wool at Para, or between Para and Port of Spain. After the ship was again trimmed by the stern at Port of Spain none of the drainage from the sugar found its way into the forward 'tween decks. The Court may draw inferences."

Upon arrival at New York, 55 bales of the libelant's wool were found to be damaged by sugar drainage, such damage amounting to $1,049.31.

The defences interposed are:

(1) The following provisions contained in the bill of lading:

> "Negligence of master or mariners * * * and all damage arising *from the goods* by stowage, or contact with, or by sweating, leakage, smell, or evaporation from them. * * * however caused or otherwise howsoever * * * or any other peril of the seas, rivers, navigation * * * of whatever nature or kind and whether any of the perils, causes or things above mentioned, or the loss or injury arising therefrom be occasioned by the wrongful act, default, negligence, or error in judgment of the owners, master, officers, mariners, crew, stevedores, engineers and other persons whomsoever in the service of the ship, whether employed on the said steamer or otherwise, and whether before or after, or during the voyage, or for whose acts the ship-owner would otherwise be liable, or by unseaworthiness of the ship at the beginning, or at any period of the voyage, pro-

vided all reasonable means have been taken to provide against such unseaworthiness * * * * excepted."

"*This contract shall be governed by the law of the flag of the ship carrying the goods.*"

(2) That the damage to the wool was due to "fault or error in the management or navigation of the vessel" and within the exemption of the third section of the Harter Act.

The District Court found.

(1) That "the primary cause of the damage was negligence and inattention in the loading or stowage of the cargo," and that the exemption from liability for loss or damage arising through "fault or error in the management of the vessel" provided in the third section of the Harter Act, did not extend to such a case (p. 46).

(2.) That such negligence in loading fell within the first section of the Statute expressly prohibiting the insertion of any stipulation in bills of lading relieving the vessel or owners from liability for loss or damage "arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge," and declaring that all words or clauses of such import "shall be null and void and of no effect" (p. 48).

(3.) That the provision that the contract should be governed by the law of the flag, did not validate the exception in the bill of lading of liability for negligence in stowage (p. 49).

The Circuit Court of Appeals held as follows (p. 54):

(1.) They concurred in the finding of the District Judge that the damage to the wool was not due to "fault or error in the management or navigation of

the vessel," but to negligence in loading or stowage of the cargo.

(2.) A majority of the Court concurred in holding that the exception in the bill of lading of liability for "damage by stowage * * * though caused by the negligence of the master" notwithstanding the provision that the contract should be governed by the law of the flag, was invalid being contrary to public policy.

(3.) Found it unnecessary to decide whether the prohibition of the Harter Act applied to a bill of lading issued at a foreign port.

(4.) Affirmed the decree of the District Court, Lacombe, Circuit Judge, concurring in the result (p. 56).

POINTS.

I.

The cause of the damage to the libelant's wool is not covered by the exception in the bill of lading.

The language of the bill of lading is "all damage arising *from the goods* by stowage, or contact with, or by sweating, leakage, smell or evaporation *from them.*"

Whatever was intended to be expressed by this language, it is apparent that the words "*from the goods*" must apply to the goods described in the bill of lading and the words "*from them*" at the end of the clause also clearly relate and apply to the goods themselves.

The language used, therefore, does not cover damage *to* the goods caused by stowage or by contact with or leakage *from other goods.*

This appears more clearly by the language of the following clause, which does except damage resulting from contact with or leakage from *certain other* cargo, viz.: "or from the leakage or flow of, or from contact with, the urine, manure, water or drainage of horses, cattle, sheep or other animals carried on the said ship" etc.

In *The Bitterne*, 35 Fed. Rep., 927, Judge Benedict, in construing a clause in a bill of lading exempting the vessel from liability for "wastage, leakage, breakage, or straining of packages or injury to wrappers however caused," held that such clause did not exempt the ship-owner "from liability for breakage of packages other than the packages named in the bill of lading."

Counsel for the appellant, in his brief (pages 5 and 8) apparently recognizes the defect in the language of the exception, and seeks to substitute the preposition "*to*" for the preposition "*from*" in the clause in question.

The principle is well established, however, that in construing exceptions in bills of lading all doubtful language is to be resolved most favorably to the shipper, and that the exemption clause must be expressed so as to cover the precise exemption claimed; and further, that general words, following particularly enumerated exceptions, will not extend the exemption to causes not specifically exempted.

Carver on Carriage by Sea, Section 77.

> "In construing exceptions in a bill of lading to the ship-owners' liability, the rule is to be remembered, that where the words leave the intention in doubt they are to be construed against the person for whose benefit they have been introduced. Their meaning is not to be extended to give him a protection for which he has not bargained in clear terms."

Compania la Flecha v. *Brauer*, 168 U. S., 104, 118.

> "Exceptions in a bill of lading or charter-party, inserted by the ship-owner for his own

benefit, are unquestionably to be construed most strongly against him."

See also the *Caledonia*, 157 U. S., 124–137.

Taylor v. *Liverpool & Gt. Western Steam Co.*, L. R. 9 Q. B., 546.

Exception—"Robbers and thieves."

Lush, *J.* (550). "It is not, I think, reasonable to suppose where the language used is ambiguous, that it was intended that the shipowner should not be liable for thefts by one of the crew or persons on board. *The shipowner must protect himself if he intends this by the use of unambiguous language.*"

In *Burton* v. *English*, L. R., 12 Q. B. D., 218, the charter-party under consideration provided that deck cargo should be "at merchant's risk."

BOWEN, *J.* (p. 224): "It is difficult at first sight to free oneself from the idea that those who drew this contract were thinking of the jettison of a deckload of timber. But still, what is the sound principle to apply? Why, it is that those who wish to make exceptions in their own favor, and by which they are to be relieved from the ordinary laws of the sea, ought to do so in clear words."

It is urged, therefore, that it is not admissible to speculate as to whether or not the respondent intended, by the language of the bill of lading, to stipulate for exemption from liability for damage *to* the goods in question by stowage, or by contact with or leakage *from other goods*, but that he must establish a clear and unambiguous stipulation excepting the particular cause of damage proved.

II.

The exception in the bill of lading of damage by negligent stowage is in direct contravention of the provisions of the Harter Act, and is void.

Since the passage of the Harter Act, clauses in bills of lading, like the one relied upon by the appellant, are invalid not only as contravening public policy, but their insertion is expressly prohibited by the statute which also declares that they shall be "null and void and of no effect."

The first section of that Act provides:

> "That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he or they shall be relieved from liability from loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."
>
> SECTION 2.—"That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided."

It cannot be, and, in fact, is not contended that the exception in the bill of lading of damage "by stowage * * * occasioned by the wrongful act, default, negligence or error in judgment of the owners, masters, officers," etc., is not such a clause as is prohibited and declared unlawful, null and void by the sections of the Statute above quoted.

The contentions of the appellant are:

(*a.*) That the first and second sections of the Act do not apply to contracts made abroad (Appellants' Brief, p. 32).

(*b.*) That the insertion of the provision that the contract should be governed by the law of the flag, rendered the Harter Act inapplicable. That by accepting a bill of lading with such provision, the shipper contracted himself out of the benefits of the statute (Appellant's Brief. p. 34).

(*a.*) In the case of The *Silvia*, 171 U. S., 462, this Court held that the *third* section of the Act applied both in terms and intent to foreign vessels and to a shipment made at a foreign port.

The language of the first and second sections is equally applicable to the case of such a shipment.

Both sections apply to vessels transporting merchandise "*from or between ports of the United States and foreign ports.*"

Had the preposition "from," alone been used the construction of the appellant might find some support; but the use of both prepositions, "*from or between*," clearly and unmistakably extends the language of the statute to all vessels engaged in foreign trade whether bound to or from ports of the United States.

The act in question as originally passed by the House was avowedly intended to affect vessels engaged in foreign trade. The Chairman of the Committee on Interstate and Foreign Commerce (Mr.

Lind) on reporting the bill to the House, stated at the close of his report:

> "As thus amended the bill relates solely to cargoes of vessels in the foreign trade."

Vol. 24 Congressional Record, p. 149.

In the bill, as reported and as originally passed by the House, the language of the first and second sections was the same as that contained in the final enactment, *viz.*, "from or between ports of the United States and foreign ports"; while in the third section the words originally used were "between ports in the United States of America and foreign ports," amended upon final passage, by substituting the words "to or from any port in the United States of America."

Appellant argues (page 32, Appellant's Brief) that if the original phrase was understood to cover vessels bound from abroad to ports in the United States, the amendment of the third section during the passage of the act was unnecessary; and that the fact that it was made indicates an intention to give to the third section an application to vessels coming from abroad, and to the first and second sections, left in their original form, a narrower application, namely, to contracts made in this country only.

This argument, however, is based upon a misconception of the reasons for changing the language of the third section. As already stated, all the provisions of the Act as originally passed by the House, related solely to vessels in the foreign trade.

In the Senate, the third section was amended so as to extend the exemption from liability for damage resulting from fault or error in navigation or management to domestic vessels, and it was to effect this purpose that the words "to or from any port in the United States of America" were substituted for the words "between ports in the United States of America and foreign ports."

When the bill with the Senate amendments came again before the House, Mr. Buchanan, of New

Jersey, called attention to the fact that the words "foreign ports" had been stricken out of the third section, and asked "whether that would not have "the effect of making the bill apply to vessels ply- "ing between do mestic ports."

Mr. Lind: "Mr. Speaker, the members of the House will understand that this bill, as it originally passed the House, simply related to vessels engaged in the foreign carrying trade. It prohibited these vessels, their masters, agents, or charterers from inserting in any bill of lading any provision which exempted them from responsibility arising from their own negligence. The bill as amended by the Senate adheres to that principle; but there is this change in the Senate bill to which I wish the attention of the House, and also particularly ask the attention of the gentleman from New Jersey, who asked this question * * * * One important new feature is presented by the Senate amendments. As the law now stands American vessels are subjected to certain hardships, from which they cannot exempt themselves by contract or otherwise, to which foreign vessels are not subjected. A foreign vessel, of course, can contract with a shipper, and make provision against any liability on its own part, for the negligence of its masters or owners; *but the object of this bill is to limit this right.* An American vessel cannot make any such contract, or absolve itself for any such liability for the reason that it is always amenable to the Federal Courts, and the Federal Courts here have always held that contracts of that character are against public policy.

Those who are more familiar with the matter of ocean navigation than I, especially the gentleman from Maine (Mr. Dingley) have agreed with me, as it was well demonstrated in the Senate Committee at the hearings which I attended, that the law as applicable to shipping in the United States ought to be somewhat more liberal than it is at present. Now, after a master, owner, or charterer has taken every precaution that human ingenuity can suggest in equipping, manning, and in furnishing his vessel, nevertheless, if out on the

high seas in stress of weather or in storms, where every man is worn out with watching, if a man falls asleep on the watch or commits any fault in navigation whereby injury results, the master, owner, or charterer is held responsible under the law. To this extent the bill relieves domestic shipping from these burdens. It provides that where the owner or owners, the charterers or the master have exercised due diligence in properly equipping, manning and stowing, making the vessel in all respects seaworthy——

Mr. Dingley: "And properly navigating——

Mr. Lind: "And properly navigating, then they shall not be liable for faults or errors of navigation solely. *Now this is absolutely the only new feature of the bill except one other.*"

Volume 24, Congressional Record, p. 1291-2.

Appellant's further contention that the provision of the statute imposing a penalty for its violation, could not be enforced in the case of a contract made abroad, and that foreign contracts are, therefore, not to be considered within the provisions of the Act, is likewise unsound.

We by no means accede to the appellant's contention that it would not be competent for Congress to prescribe such penalty. in the case of a contract made abroad in violation of the statute, where such contract is to be performed by the delivery of merchandise within the United States; or for the Court to enforce the penalty upon the actual arrival of the vessel within its jurisdiction.

United States v. *Craig* 28 Fed. R., 795.

Yet even assuming that the penalty prescribed for a violation of the statute could not be enforced in such a case, the inference sought to be drawn therefrom by the appellant is not warranted.

The statute does not leave the illegality and invalidity of such a contract to be inferred from the imposition of a penalty. It expressly declares such

contracts unlawful, and that they shall be "null and void and of no effect."

A complete remedy and protection to the owner of cargo shipped from a foreign port, irrespective of the penalty, is therefore provided by the act.

In the case of a shipment from a port in this country to a foreign port, where the foreign law might be invoked by the shipowner as validating the contract made in violation of the Act, the penalty is admittedly enforceable. On the other hand, in the case of a shipment made abroad, the shipper may safely rely upon the provisions of the statute declaring void such of the provisions of the bill of lading as are in contravention thereof.

The construction of the fourth and fifth section of the act with the first and second sections furnish no support, therefore, to the contention that the last named sections have no application to contracts made abroad.

(*b*) The argument that by the insertion of the provision as to the law of the flag all applicability of the Harter Act was done away with, and that either party could contract himself out of the benefit of the statute, if advanced seriously, seems to rest upon a failure to recognize the distinction between a benefit conferred by statute and a statutory prohibition.

Reduced to plain language such contention means that the shipowner may make just such a contract as the statute expressly and in terms forbids.

It is true that the Courts have held that the shipowner may by a special contract with the shipper waive those provisions of the act which relax his ordinary obligations. (The *Silvia*, 68 F. R., 230 233; *Hine* v. *N. Y.& Bermudez Co.*, 68 F. R., 920-923), and the other cases cited by the appellant (p. 34-35 of his brief) clearly support such holding.

The principle that "every man may renounce a benefit introduced in his own favor" has, however, this important limitation—that he cannot enter into a valid prospective agreement to waive rights which

the law has declared public policy requires should exist.

Kneettle v. *Newcombe*, 32 N. Y., 249-252.

> " Before the passage of the exemption laws, contracts for the payment of money at a future time involved the consequence that all the debtors' property, without exception, might be taken on the execution in case of default. By the statutes exempting certain property, the Legislature in effect determined that it was inexpedient to allow contracts entailing such results; and this was done by providing that certain property, of limited value, should not be taken. Parties cannot now stipulate that their contracts shall have the same effect as under the former law, for that would be hostile to the policy thus established."

This limitation is clearly recognized in the case of *Griffith* v. *Earl of Dudley*, L. R. 9 Q. B. D., 357, cited on appellant's brief.

The Court there held that the contract, waiving the provisions of Section 1 of the Employee's Liability Act, was not against public policy; and the distinction between that case and a case where the statute contains an express prohibition is clearly indicated by the language of Field, *J.*, (p. 366):

> "I do not think the words of the Act go far enough to compel the construction that the express contract by the workman against the operation of the Act should not take effect. In all cases referred to in argument, in which the Legislature has intended to enact that a person shall not be allowed to contract himself out of an act of Parliament, very express words have been used."

It would be difficult to suggest or frame more express words of prohibition than are contained in the first and second sections of the Harter Act.

III.

The exception in the bill of lading of liability for damage resulting from negligent stowage is invalid as contravening public policy, and is not validated by the stipulation that the contract should be governed by the law of the flag.

The District Judge and a majority of the Circuit Judges concurred in holding that the exception in the bill of lading of liability for damage resulting from negligent stowage, being against the public policy of this country, was invalid, notwithstanding the provision that the contract should be governed by the law of the flag.

It was from the finding of the Court upon this question, that Judge Lacombe, although concurring in the result, dissented; and the subsequent decision of the same Court in the case of *The Kensington* (94 Fed. R., 885) indicates the grounds upon which such dissent was based.

Judge Lacombe speaking for the Court in that case, stated:

> "The claimant further contends that it should have the benefit of the provision in the contract of carriage exempting it from liability for the act, neglect, or default of its servants; such stipulation being authorized by the Belgian law. In reply it is sufficient to refer to Worsted Mills *v.* Knott, 27 C. C. A., 326, 82 Fed., 471, in which a majority of this Court held that such a stipulation, being against the public policy of this country, was not enforceable by its courts. We are unanimous in the opinion that it cannot be enforced where both parties to the contract are citizens of the United States, and the place of the completion of the contract is within this country."

It is clearly to be inferred from the opinion of the learned District Judge that he considered the provisions of the first and second sections of the Harter Act applicable to a bill of lading issued at a foreign

port; a question which the Circuit Court of Appeals found it unnecessary to decide. The question whether such a shipment is within the meaning and intent of the first and second sections has already been argued, and if the libelant's contention upon this point be sustained, the question whether such stipulations are to deemed invalid upon grounds of public policy becomes immaterial, in view of the statutory declarations that all stipulations of such import shall be null and void and of no effect.

The question as to the effect of the insertion in bills of lading of a provision that the contract shall be governed by foreign law, upon the carrier's stipulation for exemption for damage resulting from negligence, has been twice argued before this Court, but not decided (*Compania* v. *Brauer*, 168 U. S.. 104). The *Victory* and *Plymothian*, 168 U. S., 410).

Since the decision of this Court in *Liverpool Steam Navigation Co.* v. *Phenix Ins. Co.*, 129 U. S., 397, it is no longer open to question that stipulations by a carrier for exemption from liability for negligence are invalid as contravening the public policy of this country and will not be enforced by the courts.

It is claimed, however, that in that case the Court merely decided that the contracts or bills of lading, there under consideration, were American and not English contracts; and that the decision furnishes no support to the contention that such stipulations should be held invalid where (1) the contract was made abroad, or (2) when it contains an express provision that it shall be governed by foreign law.

Subsequent to this decision the question has been presented to the lower courts in cases where one or both of these facts, claimed to constitute distinctions, were present, and in every case the courts have refused to enforce the stipulation for exemption, finding authority for such decisions in the opinion of this Court in the case cited.

The *Iowa*, 50 Fed. R., 161.

(Judge Nelson, Dist. of Mass.). Contract made

here, providing that it should be governed by British law.

The *Energia*, 56 F. R., 124.

(Judge Brown, S. D. of N. Y.). Contract made here, providing that it should be governed by British law).

Lewisohn v. *Nat'l S. S. Co.*, 56 F. R., 602.

(Judge Benedict, East. Dist. of New York). Contract made abroad providing that it should be gov. erned by law of flag (British).

The *Hugo*, 57 Fed. R., 403.

(Judge Brown, South. Dist. N. Y.) Contract made here providing that it should be governed by British law.

The *Guildhall*, 58 F. R., 796.

(Same Judge). Contract made at Rotterdam and stipulation for exemption valid there.

The *Glenmavis*, 69 F. R., 472.

(Judge Butler, E. D. Pa.) Contract made at Hamburg providing that it should be governed by the law of flag (British).

The opinions of the learned District Judges in the cases cited state so clearly and fully the reasons and principles leading to their determination of this question, as to leave little or nothing to be added to what they have there stated.

Opposed to these decisions is that of Judge Morris in the *Oranmore*, 24 F. R., 922, affirmed by Judge Bond in December, 1885. Both of these decisions it should be noted were rendered before the decision by this Court in the *Montana* case. The question discussed in the opinion appears to be whether in view of the provision that all questions under the contract were to be determined by English law in England, it was intended that the bill of lading should be enforced as an English contract, notwith-

standing the fact that it was made here; while the question whether it was consistent with the public policy of this country to enforce such a contract in our Courts is not referred to.

The argument of the appellant in support of his contention that the stipulation for exemption is valid and enforceable is, first, that parties to a contract may lawfully stipulate that their obligations thereunder shall be governed by, and the contract itself interpreted according to a law different from that of the forum, and that where an express provision for such foreign law is made, it will be enforced.

This general proposition may be admitted, with the limitation, that a Court which is called upon to enforce and interpret the contract is bound to consider and inquire whether any obligation or provision, sought to be enforced, is in violation of the express law or declared policy of the forum, and particularly where the whole or any part of such contract is to be performed within its jurisdiction.

The question involved in the present case is, therefore, that presented by the second proposition advanced by the appellant, namely, whether sufficient reason appears for refusing to apply the British law in determining the rights of the parties under the bill of lading.

In considering the arguments advanced in support of appellant's contention upon this point, the following facts should be borne in mind.

Although the provision in the bill of lading is that the law of the flag (British) should govern, no part of the contract of carriage was to be performed within British jurisdiction.

The contract was made at Buenos Ayres.

The change in trim which caused the damage was made in Brazil and the damage occurred there or on the high seas.

There is no proof in the case of either the Argentine or Brazilian law, which must, therefore, be assumed to be the same as our own.

The contract was to be performed in part in this country.

The considerations advanced by the appellant are:

(*a.*) That the contract was signed abroad.

This fact alone does not aid his contention, as in the absence of proof to the contrary it must be assumed that the stipulation for exemption from liability for damage caused by negligent stowage was invalid by the Argentine law. He is forced, therefore, to fall back upon the provision for the law of the flag as excluding the *lex loci contractus.*

(*b.*) That the parties to the contract were foreigners.

While by the bill of lading Wantge & Schlief, of Buenos Ayres, appear as the shippers of the cargo, it is shown that the libellant, a domestic corporation, was the owner of the goods at the time of shipment (Record, p. 7).

(*c.*) That the stipulation for the law of the flag was reasonable as tending to provide uniform rules for the determination of controversies possibly arising at the ports of different countries included within the voyage; and that it was not designed to evade our law on the subject of negligence exemptions.

This contention would be entitled to consideration were it attempted to disregard the stipulation for the law of the flag *in toto*, as for instance in the case of a bottomry bond cited by appellant. The validity of the stipulation for the law of the flag, by itself, is however not attacked, but its attempted application, to bolster up an invalid exception of negligence, is.

The reason for its introduction may, or may not, have been a design to evade our law; its attempted application undoubtedly is.

The contention as to the desirability and advantage of uniformity is open to this criticism in this case.

The bill of lading in this case contains the following clause:

> "With liberty * * * to substitute or transship the goods by any other steamer before the commencement of or at any period of the voyage."

Under this provision of the bill of lading what assurance had the *shipper* of the law which was to govern the transportation of his cargo?

Before the commencement of the voyage the "Portuguese Prince" might have transferred the cargo to a steamer of any nationality, and the "law of the flag of the ship carrying the goods" might be that of any one of a dozen different nations.

(*d.*) That there is nothing in our public policy to prohibit parties contracting abroad from providing that their obligations touching matters to be done without our jurisdiction shall be governed by foreign law.

It is submitted that it is upon the determination of this question that the appellant's whole contention depends.

The learned District Judge in his opinion (p. 49) set forth in the following concise language his conclusions upon this point, the reasons for which he had more elaborately stated in his previous decisions in The *Brantford City*, The *Energia*, The *Hugo*, and The *Guildhall*.

> "Foreign law is administered only upon principles of comity. This cannot be allowed to subvert in our courts our own positive law founded upon public policy, as respects contracts to be performed in part within our jurisdiction and in part upon the high seas."

In *Railway Co.* v. *Lockwood*, 17 Wall., 357, this Court held that it was contrary to the interests of the whole public that carriers should be permitted to stipulate for exemption from liability for negligence; that the public interest—the interest of the State—is involved, before which the liberty to con-

tract of the shipper and carrier must give way. The principle laid down is therefore based upon the broad ground of public policy as distinguished from the right of, or injury to, the individual shipper.

The attempt to limit the application of the decision in this case to "railway cases," upon the ground that the greater freedom and competition in maritime commerce removes the element of oppression, was met by the language of this Court in The *Montana*, 129 U. S., 397-441, applying the language of the *Lockwood* case to a case of ocean carriage.

> "The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out and seek redress in the courts. He prefers rather to accept any bill of lading or sign any paper that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business."

In view of the fact that the refusal of this Court to enforce such stipulations, is based upon the public injury which would result therefrom, upon what grounds can it be properly held that the carrier may, by inserting in his contract a stipulation that a foreign law shall govern his obligation to deliver cargo here, obtain the exemption to the public detriment?

In the *Glenmavis*, Judge Butler said (476)

> "The stipulation that the parties shall be subject to the laws of England is unimportant, as it adds nothing to the implication which would arise in its absence. The ship bore the English flag, and the laws of Germany where the contract was made, as well as those of England, sustain such provisions. That the intent of the parties in this regard is thus expressed is, therefore, immaterial. In every instance where the courts have declared such stipulations void, it has, of course, been against the express agreement of the parties."

In the *Iowa*, Judge Nelson in referring to a similar stipulation said (563)

> "The libellant is entitled to recover in spite of the clause providing that all questions arising under the contract shall be decided according to British law. This seems to be an attempt in an indirect way to stipulate that the ship owner shall be exempt from responsibility for the negligence of his servants, since the British law is supposed to uphold such exemptions."

The public policy of this country would be as much violated by permitting such exemptions in the case of shipments to this country as in the case of shipments from our ports.

Even had the appellant been able to prove that the exception relied on was valid by the Argentine law, the Court should not enforce it.

Oscanyan v. *Arms Co.*, 103 U. S., 261, 277.

> "Contracts permissible by other countries are not enforceable in our courts, if they contravene our laws, our morality, or our policy. The contract in suit was made in this country, and its validity must be determined by our laws. *But had it been made in Turkey, and were it valid there, it would meet with the same reprobation when brought before our courts for enforcement.*"

Thatcher v. *Morris*, 11 N. Y., 438.

> "If however a contract is made and to be performed without the State, and is valid by the laws of the State where it is made and to be performed, it would be upheld by the Courts of this State, out of respect to the foreign law, and upon principles of comity by which courts are governed, if not contrary to the principles of morality *or public policy*, although such contract would be illegal within this State."

The principle laid down in the English cases is the same.

Although the English courts may differ from ours as to what contracts are to be deemed to contravene public policy, and may be inclined to restrict the class of contracts subject to such objection, nevertheless, when it has once been determined that a contract is contrary to public policy, they have refused to enforce the same, notwithstanding the fact that they were valid where made, when any part of same was to be performed within the jurisdiction.

Hope v. *Hope*, 8 De Gex M. & G., 731.
Roussilon v. *Roussilon*, 14 Ch. D., 351, 369.
Hamlyn v. *Talisker*, (1894) A. C., 202, 209, 214.

IV.

The damage to the cargo did not result from "faults or errors in navigation or in the management of said vessel" and was not within the provisions of the 3d Section of the Harter Act.

Both of the Courts below agreed in holding that the damage to the wool was not due to fault or error in the management or navigation of the vessel, but to negligence in the loading or stowage of the cargo.

The contention of the appellant is that the negligence consisted in failing to keep the ship trimmed by the stern so that the sugar drainage would flow aft to the scuppers, and that negligence in this respect was "fault in management."

His argument is that the original stowage of the wool at Buenos Ayres was proper; that the stowage of the sugar at Pernambuco was proper, the ship then being trimmed by the stern; and that the loading and stowage of the cargo was therefore

completed before the change in the trim of the ship took place.

It is not contended that, if the wet sugar had also been stowed at Buenos Ayres and the ship had left that port by the head, or if both the wool and sugar has been stowed at Para, the damage to the wool could be attributed to anything but negligence in the stowage or care of the cargo.

But can the fact that the different cargoes were shipped at different ports and that the change in the trim of the vessel occurred at a third port, change the cause of the damage from negligence in stowage or care of the cargo to "negligence in management"? If so, in case other cargo had been stowed at Para in the same compartment with the libelant's wool, and had suffered damage from the same cause, the owner of such other cargo would be entitled to recover the damage to his cargo, while libelant would be remediless.

The cause of all the damage would be the same, yet in the one case the appellant would term it fault in stowage and in the other fault in management.

(*a.*) The manifest intention of the Harter Act is to hold the ship-owner to the exercise of the utmost diligence in providing and loading his vessel so she may carry the cargo safely, and the exemptions which it provides are conditional upon the fulfilment of this obligation.

In *Dobell v. SS. Rossmore Co.* (1895). 2 Q. B., 408, 417, the Court, referring to the 3d Section of the Statute, said:

> "I think that the meaning of the Section is that, if the ship-owner by himself or his agent uses due diligence to make the ship seaworthy when she starts he shall not be liable for what happens afterwards when the ship is at sea and when he has no more control over her."

The "Portuguese Prince" (owned in England) was trading in a regular line between New York

and the several ports of the River Plata, Brazil, and the West Indies, loading and discharging cargo at each of said ports, and in each of said ports there was a resident agent of the line.

At which of said ports did the obligations of the owner or his agents cease?

What reason can be advanced for holding him to a less or different responsibility for the acts or omissions of his agents at the port of Para, than would be applied in case the vessel had left either Buenos Ayres or Pernambuco in an unfit condition to carry the cargo safely?

The vessel was equally under his control at each of these ports, and he should be held to the same measure of responsibility for faults or omissions of his agents at either of them.

It is part of the carrier's duty so to stow and arrange the different articles of which the cargo consists, that they may not be injured by each other; and as said by the learned District Judge (p. 46 of Record):

> "The wool should not have been stowed forward of the wet sugar unless care was taken in the other loading, and in all subsequent changes in the loading, to see that the ship did not get down by the head."

Such changes in trim were to be anticipated and had, indeed, taken place before either the wool or sugar were loaded. The vessel had left Montevideo *two inches by the head*, Buenos Ayres *six inches by the stern*, Santos *four feet by the head*, Rio *four feet six inches by the stern* and Pernambuco *ten inches by the stern*, before arriving at Para (Respondent's Exhibit D, page 29).

Can the failure to provide against the consequences of the vessel's trim while at and on leaving the port of Para be deemed any the less negligence in the stowage or care of the cargo, than if, for the purpose of preventing damage to the wool, the cargo had been shifted at the port of Para (as should

have been done, Record, p. 21) and had been damaged by negligence during the operation?

(*b.*) The term "management" as used in the Harter Act should not be held to cover or include any act or omission primarily connected with the care of the cargo.

The words of the statute are "faults or errors in navigation or in the management of said vessel."

While the word "navigation" has been the subject of judicial definition, there appears to be an absence of a definite and comprehensive definition of the word "management."

It has, however, been held, in interpreting the terms navigation and management, as used in the Harter Act, and in bills of lading prior to its enactment, that, by the addition of the word "management," it was intended to extend the exemption merely to certain faults akin to faults in navigation which might not fall within a strict definition of the latter term.

In *Carmichael* v. *Liverpool Ship-owners' Association*, 19 Q. B. D., 242, Lopes, *J.*, in defining improper navigation, said at page 251:

> "In my opinion *improper navigation* means the *improper management* of a ship in respect of the cargo during the voyage."

In *The Ferro* (1893), Probate, 38, where the bill of lading contained an exemption for loss from neglect "in the navigation or management of the ship," Sir Gorrell Barnes said (p. 46):

> "I think it is desirable also to express the view which I hold about the question turning ing on the construction of the words 'management of the ship.' *I am not satisfied that that they go much, if at all, beyond the word 'navigation.'* Some things may be suggested to which the word 'management' is perhaps applicable beyond that of 'navigation,' but I feel that it is not such clear and expressive

> language as to include within it the words 'improper stowage.' *It seems to me a perversion of terms to say that the management of a ship has anything to do with the stowage of cargo.*"

In *The Glenochil* (1896), Probate, 10, Sir Francis Jeune (at page 16) again expressed the opinion that the word "management" went somewhat, but not much, beyond "navigation," and expressly reaffirmed the decision in *The Ferro*, "that mere stowage is an altogether different matter from the management of the vessel."

To what extent then should the word "management" be held to cover and include acts or omissions not properly comprehended within the term "navigation?" The learned District Judge in his opinion in this case has pointed out so clearly the test to be applied, that it is difficult to add to what he has there stated (p. 47):

> "The handling of the ship's appliances with reference to the navigation or the safety of the ship for the purposes of the voyage, belong to the management of the ship."

To the same effect is the language of Sir Francis Jeune in *The Glenochil* at page 16, holding that "management" included a "class of acts which do not affect the sailing or movement of the vessel but do affect the vessel herself," and laying down the distinction between "want of care of cargo and want of care of vessel *indirectly* affecting the cargo."

As pointed out by the District Judge, the negligence in this case was in respect to the cargo alone; the navigation of the vessel, her safety, the prosecution and completion of the voyage, were in no way affected by the change in her trim; she herself was in as seaworthy a condition by the head as if trimmed by the stern, and there was no misuse of any part of the ship's appliances or failure to use the appliances furnished by the owner.

In the cases in which shipowners have been held

entitled to exemption under the statute, one or more of the above mentioned elements have been present.

In *The Silvia*, 171 U. S., 462, this Court held that "Navigation and management" included "the "control during the voyage of everything with "which the vessel is equipped for the purpose of "protecting her and her cargo against the inroad "of the seas; and if there was any neglect in not "closing the iron covers of the ports, it was a fault "or error in the navigation or in the management "of the ship."

In *The Sandfield* (79 F. R., 371; 61 U. S. App., 385), a leak was occasioned by sea perils, and the crew failed to open a sluice gate provided for the purpose of emptying the bilges. It was held that "the opening of valves, sluices and ports during the voyage is a part of the management of the ship."

In the *Mexican Prince* (82 Fed. R., 484), a valve in a cargo compartment of a tank steamer was negligently opened during the operation of discharging ballast water from an adjoining and connected compartment during the voyage.

In *The British King* (89 F. R., 872) there was neglect in sounding and using the pumps to free the vessel from water taken in through a leak in heavy weather, and the failure to take soundings and apply the pumps was held to be negligence in management of the ship.

In the *Etona* (64 F. R., 880; 38 U. S. App., 50) both Courts found that there was no negligence in stowage. The Harter Act was considered only as affecting the question of liability for the stranding of the vessel which was claimed to have been caused by negligence of the pilot. What was said in respect to the application of the Harter Act in that case is, however, adverse to the appellant's contention, the Circuit Court of Appeals holding that, in case the stranding was due to the pilot's negligence, "the third section of the Harter Act protects the ship against libelant's claim, *since there has been*

no negligence, fault or failure in loading or stowage."

In the *Glenochil* (1896), Probate, 10, the engineer negligently omitted to ascertain the condition of the sounding pipe and casing, which had been broken by heavy weather during the voyage, before running water into a ballast tank, the water damaging the cargo. The bill of lading incorporated the Harter Act and the Court held that the damage resulted from "fault in management." The decision was however expressly based upon the fact that the negligent act was one done for the safety of the ship herself, and not primarily in connection with the cargo, the distinction made by the learned District Judge in the case at bar being clearly and explicitly recognized.

Sir Francis Jeune (p. 14).

> "It is sufficient for us to say that it is negligence consisting in a mismanagement of part of the appliances of the ship, and mismanagement which arose because it was intended to do something for the benefit of the ship, namely, to stiffen her, the necessity for stiffening her arising because part of her cargo had been taken out of her." * * * *
> "No doubt the object of S. 1 is in terms to prevent clauses being inserted in mercantile instruments which would exempt the carrier from want of proper care in regard to the cargo. It is obvious that those words cannot be taken in their largest sense, because in a secondary, though not primary sense, any mismanagement of the ship in navigation or otherwise, is want of proper care as regards the cargo. But it is clear that it was intended by S. 3 to exempt from liability for damage or loss resulting from faults or errors of navigation or in the management of the vessel; and the way in which those two provisions may be reconciled is, I think, first that the Act prevents exemptions in the case of direct want of care in respect of the cargo, and secondly, the exemption permitted is in respect of a fault primarily connected with the navigation or the management of the vessel and not with the cargo."

Gorrell Barnes, *J.*, in considering the several sections of the Act, said (p. 19):

> "But I think if those sections are looked at there will be found a strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself; and I think that where the act done is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of the said vessel.'"

On the other hand in The *Ferro*, *supra*, the stowage of rotten oranges with sound ones and placing sound boxes so that their ends rested on angle irons and were broken by pressure, was held not to be a fault in "navigation or management."

In The *Whitlieburn*, 89 Fed. Rep., 526, the District Judge held that "fault in management of the vessel" did not cover and include the stowing and ballasting of a light cargo in such a manner as to render the vessel crank and topheavy, and that the third section of the act did not exempt the shipowner from liability for loss resulting from a consequent jettison.

(*c.*) To extend the meaning of the words "management of the vessel" to cover and include negligence in the care of the cargo would violate the intention of the act as a whole.

The uniformly acknowledged and established principle in the interpretation and construction of statutes, that every part of an act is to be taken into consideration for the purpose of discovering the intention of the legislature, and that, where particular provisions are contained in it, the construction of general words is not to be extended to nullify the more particular provisions, requires that the general

words contained in the third section should not receive an interpretation which would contradict the particular intent of the first and second sections.

The first section of the Act declares it unlawful to insert any provision whereby the ship-owner "shall be relieved from liability for loss of damage resulting from negligence, fault or failure in proper loading, stowage, custody or care" of cargo.

The second section declares it unlawful to insert any agreement "whereby the *obligations* of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in anywise be lessened, weakened or avoided."

While admitting and recognizing the rule of interpretation above stated, the appellant contends that the exemption for faults in management is explicit, while the liability of the ship-owner as respects the matters enumerated in the first and second sections is not defined but is matter of inference only; and that the proper application of the rule, therefore, requires that the language of the third section should prevail. (Appellant's Brief, p. 40.)

The language of the first and second sections is so express, however, as to exclude all necessity for *inference*. "Liability for loss or damage" is the language of the first section, strengthened, if there be necessity therefor, by the language of the second section—the "*obligations of* the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly handle and deliver the same."

It is submitted, therefore, that to include negligence in the care of the cargo within the term "management of the vessel" as used in the third section, would be repugnant to the manifest intention of the Act to make the ship and owner responsible for such neglect.

The contention that it was the intent of Congress to absolve the ship-owner from liability for failure

of his officers and crew in everything within the scope of their duties from the time the cargo comes on board until ready for delivery at its port of destination is also clearly negatived by the language of the second section, expressly covering the acts of "master, officers, agents or servants" in respect to duties and obligations necessarily arising after the receipt of the cargo on board.

LAST POINT.

The decree of the Circuit Court of Appeals should be affirmed with costs.

Respectfully submitted,
LAWRENCE KNEELAND,
Counsel for Botany Worsted Mills,
Appellee.

No. 32.

Brief of Mynderse for Respondent

Supreme Court of the United States,

OCTOBER TERM, 1899.

Filed Oct. 10, 1899.

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JAMES H. McKENNEY
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JAMES KNOTT,
Respondent and Appellant,

against

THE BOTANY WORSTED MILLS,
Libellant and Appellee.

No. 32.

JAMES KNOTT,
Respondent and Appellant,

against

HENRY P. WINTER and CHARLES F. SMILLIE,
Libellants and Appellees.

Brief for Libellants Winter and Smillie.

The above entitled causes come before the Court under a writ of *certiorari* issued to the United States Circuit Court of Appeals for the Second Circuit (*Rec., p.* 57).

The libellants were the consignees of thirty-nine bales of wool shipped on the steamer *Portuguese Prince* at Buenos Aires for delivery in New York. The bales were shipped in good order, but when delivered to the libellants at destination thirty-seven bales had been damaged by drainage from sugar.

Winter & Smillie, the libellants, filed a libel in the District Court of the United States for the Southern District of New York against the respondent James Knott, as the owner of the steamer, to recover the amount of damage to the wool. Their libel was sustained and a decree was entered in their favor. Another shipment of wool, consigned to the Botany Worsted Mills, was damaged to the extent of fifty-two bales, and a libel was filed by the Botany Worsted Mills in respect of such damage. That libel also was sustained.

The actions were tried together in the District Court, and the decrees entered in the District Court were upon appeal affirmed by the Circuit Court of Appeals.

The *Portuguese Prince* was a British steamer, and belonged to the Prince Line. This line traded between New York, Brazil and the River Plate, touching at some islands of the West Indies. The line had resident agents in each port, and a resident superintendent in New York (*Saunders, pp.* 25, 26). It was established in 1892, and its steamers were carriers of general merchandise, receiving and delivering cargo at each port (*Saunders, pp.* 25, 26).

The advertisements of the steamers were under the general name of the Prince Line.

A specific admission was made upon the trial that the steamer was a common carrier (*Rec., p.* 14).

The sugar, from which the drainage came, and also both consignments of wool, were stowed in the between-decks forward of the engine-room. This compartment was about eighty feet in length, and about thirty-four feet wide (*Saunders, pp.* 20, 24–25).

The compartment was, on this voyage, divided by a transverse temporary wooden bulkhead, which stood about in line with the foremast, and divided the compartment about equally (*Saunders, pp.* 16–17). The dividing bulkhead was not a part of the original construction of the vessel, but was movable, and, in fact, was moved about to suit the convenience of cargo (*Saunders, p.* 27). There were doors in it (*Saunders, p.* 17).

The wool was stowed in the division which was forward of the temporary bulkhead, and ran from the forward

part of the compartment to within ten feet of the temporary bulkhead (*Saunders, pp.* 16–17).

The bales were stowed on end, nine in a row, and from the size of the bales there must have been about ninety in that compartment (*Saunders, p.* 17). There were eighty-nine bales damaged, and Mr. Saunders is therefore in error when he says only three rows were damaged (*Saunders, p.* 22.) The wool appears to have been dunnaged (*Saunders, p.* 17).

After leaving Buenos Aires, the steamer proceeded to Santos, Rio, Bahia, and Macio and then to Pernambuco, at which port two hundred tons of crude green sugars were put in the between-decks in the division abaft the temporary bulkhead. The sugars were wet and were expected to drain heavily (*Saunders, pp.* 16, 22). They were a character of cargo ordinarily taken by the steamers of the line (*Saunders, p.* 27).

The construction of the *Portuguese Prince* was such that if she were on an even keel the drainage would run aft. With a trim of six inches by the head, the drainage would still run aft so long as she was stationary, but moving through the water she would, in such trim, and with her natural tendency to dip, carry the drainage forward (*Saunders, p.* 20).

When the steamer left Pernambuco, after loading these sugars, she was trimmed ten inches by the stern, and upon arrival at Para, which was the next port, she was still trimmed by the stern (*Exhibit D, p.* 29). She lay at Para ten days discharging cargo, and when she left Para she was trimmed two feet by the head (*Exhibit D, p.* 29). She carried this trim upon arrival at the next port, Port of Spain, Trinidad, but during her two days' stay there, her trim was corrected, and when she left that port she was trimmed one foot by the stern (*Exhibit D, p.* 29).

There was no cargo stowed between the wool and the temporary bulkhead, nor was there any cargo stowed between the sugars and the temporary bulkhead.

It has been formally admitted that the wool was damaged by drainage from the sugars finding its way forward through the temporary bulkhead at Para, or between Para

and Port of Spain, the drainage being carried forward by the trim of the vessel (*Exhibit A, p.* 28).

Bills of lading were signed and issued by the resident agents at the port of shipment (*Exhs., p.* 28). The resident agents at each port engaged freight and attended generally to the vessel's business (*Saunders, p.* 26).

The appellant seeks relief:

1st. Under a claim that he is entitled to have the contract construed in accordance with the law of Great Britain, and that the contract when so construed relieves him from liability.

2d. Quite inconsistently, that the provisions of the Harter Act relieve him from liability.

POINTS.

First.

THE LIBELLANT CANNOT FIND RELIEF UNDER THE BRITISH LAW.

A. The Court, before it determines whether the British law is to govern the contract of carriage, will first inquire whether the contract, if construed under the British law, would relieve the shipowner from liability.

Compania la Flecha vs. *Brauer*, 168 *U. S.*, 104, 118.

Foreign law must be pleaded and proved.

Liverpool Steamship Co. v. *Phenix Ins. Co.*, 129 *U. S.*, 397, 445, 446.

The only proofs in the case as to the state of the British law is found in the libellant's answers to interrogatories, in which the libellant states that he

> "is informed and believes that some English courts
> "have held that under the laws of England the
> "owners of vessels are permitted in England to
> "make contracts which exempt them from liability
> "for the negligence of their servants in loading,
> "stowage and carriage of goods" (*Rec., pp.* 7, 8).

There are no proofs that the British law would relieve the shipowner from liability in respect of general acts of negligence or default on the part of the master or mariners, as claimed by the appellant in the first point of his brief.

Indeed it can scarcely be contended that the proofs are sufficient to establish that the British law would sustain a contract by which the shipowner was specifically relieved from the consequences of negligent stowage on the part of his servants.

Moreover, assuming that the damage to the wool was due to bad stowage, by which the drainage from the green sugars ran to the wool, there are no terms in the bill of lading which purport to exempt the shipowner from liability for such damage.

The words which are pleaded in the answer of the appellant are:

> "and all damage arising *from* the goods by stowage or contact with, or by sweating, leakage, smell or evaporation *from* them" (*Rec., pp.* 4, 11).

Plainly these words do not purport to relieve the shipowner from liability for damage *to* the goods from other goods.

Indeed they are so far away from the mark that the appellant's counsel forcibly changes the word "from" to "to," although this Court has said:

> "Exceptions in a bill of lading or charter-party
> "inserted by the shipowner for his own benefit
> "are unquestionably to be construed most strongly
> "against him."
>
> *Compania la Flecha* vs. *Brauer*, pp. 104, 118.

The appellant, instead of seeking the construction of the words most unfavorable to him, is not even satisfied with

the most favorable construction which can be given to the words, but in order to get any relief from the provision must perforce change the language.

It does not rest upon the consignees to determine just what the shipowner had in mind when he inserted the provision which appears in the bill of lading.

It does not rest with them to establish that the provision has *any* meaning. It may be suggested, however, that the provision as it appears in the bill of lading was drawn by the shipowner with a view of covering the classes of damage referred to in the case of Ohrloff *vs.* Briscal (*The Helène*), *L. R.*, 1 *P. C.*, 231.

In that case certain bales of wool were damaged through leakage from casks of oil. The leakage of the casks was induced by heat generated by the bales, which dried the staves of the casks. The damage to the bales may therefore be said to have sprung from the bales themselves. For such character of damage the class which actually appears in the bill of lading would be in a measure appropriate.

Moreover it may fairly be said that even under the altered phraseology which the appellant's counsel adopts, the present case would not be covered. The words "bad stowage" are not quite appropriate to describe the situation of the cargo on the *Portuguese Prince*. Indeed the counsel for the appellant himself, in another branch of his brief, asserts that the faulty conditions which led to the loss are not to be deemed "faults in stowage" (*Appellant's Brief, p.* 38).

The other words of the bill of lading "or from the leakage or flow of or from contact with the urine, manure, water, or drainage of horses, cattle, sheep or other animals, &c.," are clearly inaplicable to the present case.

There being no proofs that the British law would relieve the shipowner from liability for the general unspecified acts of negligence of his servants, and it appearing that the bill of lading contained no provisions applicable to the case, we submit that it is unnecessary to determine whether or not the appellant is entitled to have his contract construed in accordance with the laws of Great Britain.

B. There is no valid provision in the bill of lading subjecting the contract to the law of Great Britain.

Such subjection is claimed by the appellant under the clause of the bill of lading, which provides:

"This contract shall be governed by the law of the flag "of the ship carrying the goods."

The appellant claims that the law of the flag is the British law, and that by such law, the clause exempting him from responsibility for stowage is valid.

But by the first section of the Harter Act, the exemption clauses relied upon are declared null and void, and there is materially nothing therefore upon which the British law, if applicable, and if proved, could take effect. The stipulation, however, for the application of foreign law is invalid.

Lewisohn v. *National S. S. Co.*, 56 *Fed. Rep.*, 602;
The Silvia, 68 *Fed. Rep.*, 230, 231;
The Glenmavis, 69 *Fed. Rep.*, 472, 476;
The Brantford City, 29 *Fed. Rep.*, 373, 396;
The Hugo, 57 *Fed. Rep.*, 403, 411;
The Etona, 64 *Fed. Rep.*, 880;
The Guildhall, 58 *Fed. Rep.*, 796;
The Energia, 56 *Fed. Rep.*, 124, 127, *and* 66 *Fed. Rep.*, 604;
The Iowa, 50 *Fed. Rep.*, 561.

If the Harter Act is not considered controlling then the the provisions of the bill of lading should be determined by the standard of what is "just and reasonable in the eye of the law."

Railroad Co. vs. *Lockwood*, 17 *Wallace*, 357, 380, 382.

While it might be "just and reasonable" to apply the British law, under a properly framed stipulation therefor, in respect of cargo destined for England, it is not "just or reasonable" to make it applicable to the transportation of cargo from South America to the United States.

It might be "just and reasonable" to provide that the contract should be regulated by the law of the port of shipment, where the relations of the ship and shipper begin; or it might be "just and reasonable" to provide that the contract should be regulated by the law of the port of destination, where the relations of ship and shipper terminate; but it is unnatural, and therefore unjust and unreasonable, to forcibly subject a contract of carriage to the laws of a country foreign both to the port of shipment and the port of delivery.

The stipulation for the law of the flag does not, moreover, fairly and explicitly introduce the British law. The bill of lading provides:

> "The company reserves the liberty *before shipment* or at any subsequent period, and so often as may for any cause be deemed expedient at any place to ship the whole or any part of said goods by *any other steamer* or vessel *whether belonging to the company or not.*"

And then provides:

> "This contract shall be governed by the law of the flag of the ship *carrying* the goods."

It cannot be said that a shipper, receiving such a bill of lading, has made an enforcible stipulation for the application of British law. The bill of lading does not specify the law of any named nation. While shipment was contemplated on a British vessel, the right was reserved to the shipowner, *before shipment* or afterward, of shipping the cargo on any other steamer, of any owner, and of any flag, without notice to the shipper. The shipper could not know the nationality of the *carrying* vessel and cannot be deemed to be bound to the law of its flag.

Such a stipulation is not "just and reasonable in the eye of the law."

Second.

THE HARTER ACT DOES NOT RELIEVE THE SHIPOWNER.

The first section of that act prohibits the insertion in a bill of lading, of any clauses, covenants, or agreements, relieving the manager, agent, master or owner of any vessel transporting merchandise between ports of the United States and foreign ports, from liability for loss or damage through negligence or omissions in loading, stowing, *caring for* or delivering cargo, and declares that all such clauses shall be null and void.

The second section prohibits the insertion in any bill of lading, of a covenant or agreement whereby are lessened, weakened or avoided the obligations of an owner to make his vessel seaworthy, or the obligations of a master, or agent to carefully handle and stow and *care for* and deliver cargo.

The third section relieves the shipowner who has exercised due diligence, from responsibility for damage resulting from faults or errors in navigation or management of the vessel.

The Act must necessarily be construed as a whole and the stringent provisions of the first and second sections indicate that the responsibility is left upon the owner of properly stowing and "caring for" the cargo, and that he is relieved from responsibility for damage to cargo only when it comes through navigation and management of the vessel when she is at sea and beyond his control. It is not enough that the cargo be originally stowed in a place of temporary safety. The obligation upon the owner is a continuing one. He cannot relieve himself from responsibility for the "custody" and "care" of the cargo. (*Section* 1.) Nor can he relieve himself from the obligation to "care for" it. (*Section* 2.)

These provisions contemplate not only that the cargo shall be well stowed originally but that due provision shall be made from the outset and shall be continued wherever practicable to maintain it in safety.

The analytical criticism of appellant's counsel, in his effort to show that the provisions of sections one and two

do not apply to bills of lading issued in a foreign port, is not pertinent to the case. Even if we assume that the Act does not prohibit such insertion of the negligence clauses and that they are therefore not "null and void " through the operation of the statute," it is clear that in the light of the proved negligence of the shipowner and his servants, the clauses do not afford him protection.

R. R. Co. vs. *Lockwood*, 17 *Wallace*, 357, 380.

Liverpool Steamship Co. v. *Phenix Ins. Co.*, 129 *U. S.*, 397, 438.

When the entire cargo of a vessel is taken at one port, the cargo must at least be properly stowed at the time it leaves port, and it must have all proper surroundings for its protection through the voyage.

When the cargo is loaded in partial lots at successive ports the obligation of good stowage is a recurrent one arising at each port.

It may be admitted that the wool was put on at Buenos Aires suitably dunnaged, to protect it from the dangers then existing We urge, however, that the owner failed in his duty when, at Pernambuco, he placed substantially in the same compartment with the wool, two hundred tons of wet sugars, with full knowledge that such sugars would drain and that the cargo of wool was protected in respect to such drainage only by the temporary trim of the vessel by the stern. The bulkhead between the wool and the sugar was no protection, and it was not intended to be a protection. So far as it afforded any appearance of protection to the wool, it was a delusion.

The owner, the master, and the agent all knew that the bulkhead was only temporary in its character, and that it was shifted from place to place to meet the emergencies of loading, and that it had doors.

They were bound to contemplate that through the pitching of the vessel at sea, the sinking of her head while ploughing through the waters (*Saunders, p.* 20), or by the shifting of weights through receipt or discharge of cargo at later ports, the trim would be from time to time

changed, and that thereby the drainage might be thrown forward.

It was negligence to place the wet sugars in close promimity to the wool, with no other protection for the wool than the temporary trim of the vessel.

It happened that no damage came to the wool at Pernambuco, nor until after arrival in Para ten days later. While at Para the trim of the vessel was so changed, through discharge of cargo, as to send her out from that port nearly two feet by the head, which trim was subsequently maintained for six days, and until after reaching Port of Spain, Trinidad (*Exhibit D, p.* 29).

If the word "seaworthy" relates purely to the condition of the hull, it must certainly relate to the condition of the hull for the purpose of its contemplated use. In that aspect, the bulkhead did not make the vessel seaworthy for the transportation of wet sugars and dry wool in the forward between-decks.

But unseaworthiness may relate to a condition of loading as well as to a condition of the hull.

Carver Carriage by Sea, Second Edition, Section 18.

The stowage of the wool and the responsibility of the owner in respect thereto was not disposed of by putting the bales in a dry place and fairly dunnaged at Buenos Aires. The stowage of the wool was changed at every port, not by physical removal of the wool, but in its surroundings.

Certainly it could not be said that the shipowner had discharged his responsibility in respect to the stowage and care of the wool by putting it on a dry deck well dunnaged at Buenos Aires, if at the next port he had put on it wet and draining cargo.

The position of the shipowner under the Act is partly defined in the *Sylvia* (171 *U. S.*, 462, 465). In order to secure exemption from the consequences of errors in "navigation" or "management" the shipowner must "exercise due diligence to make the vessel in all respects

"seaworthy and properly manned, equipped and sup-
"plied." This is a duty which falls upon the shipowner in port, and which he must thoroughly perform in each port.

Can it be said that the *Portuguese Prince* was properly equipped and supplied for the transportation of general cargoes under the many conditions which would arise at her numerous ports of shipment and discharge, when she was equipped only with an open and movable bulkhead to separate the classes of cargo which would probably be shipped and which would involve such danger to each other?

The case of the *Sylvia* intimates that the acts for which the shipowner may be relieved are acts of "navigation" or "management," at sea only, and not in port.

The phraseology of the statute carries the same import, in that it implies that it is only the faults or errors of the officers and crew of the vessel in respect to which exemption is given. The exemption is given to the "owner "or owners, *agent*, or charterers." It is not given to the owner in respect of the acts of his agent, nor in places where he or his agent can, by diligence, guard against losses.

The present case differs from that of the *Etona*, 71 *Fed. Rep.*, 895. In that case the list was given to the vessel through negligent stranding and while in charge of a pilot, while the *Portuguese Prince* took her trim while in port, a place where the shipowner was represented by an agent. She took a trim which might have been contemplated and which could have been corrected either by the use of her water ballast tanks or by a re-arrangement of cargo (*Saunders, fols.* 128, 129).

Recent English cases are fully discussed in the opinion of the District Judge—

The Glenochil (1896) *Probate Division* 10.
The Ferro (1893) *Probate Division* 38.
See also *Dobell against S. S. Rossmore Company*, (1891) 2 *Q. B.* 408.

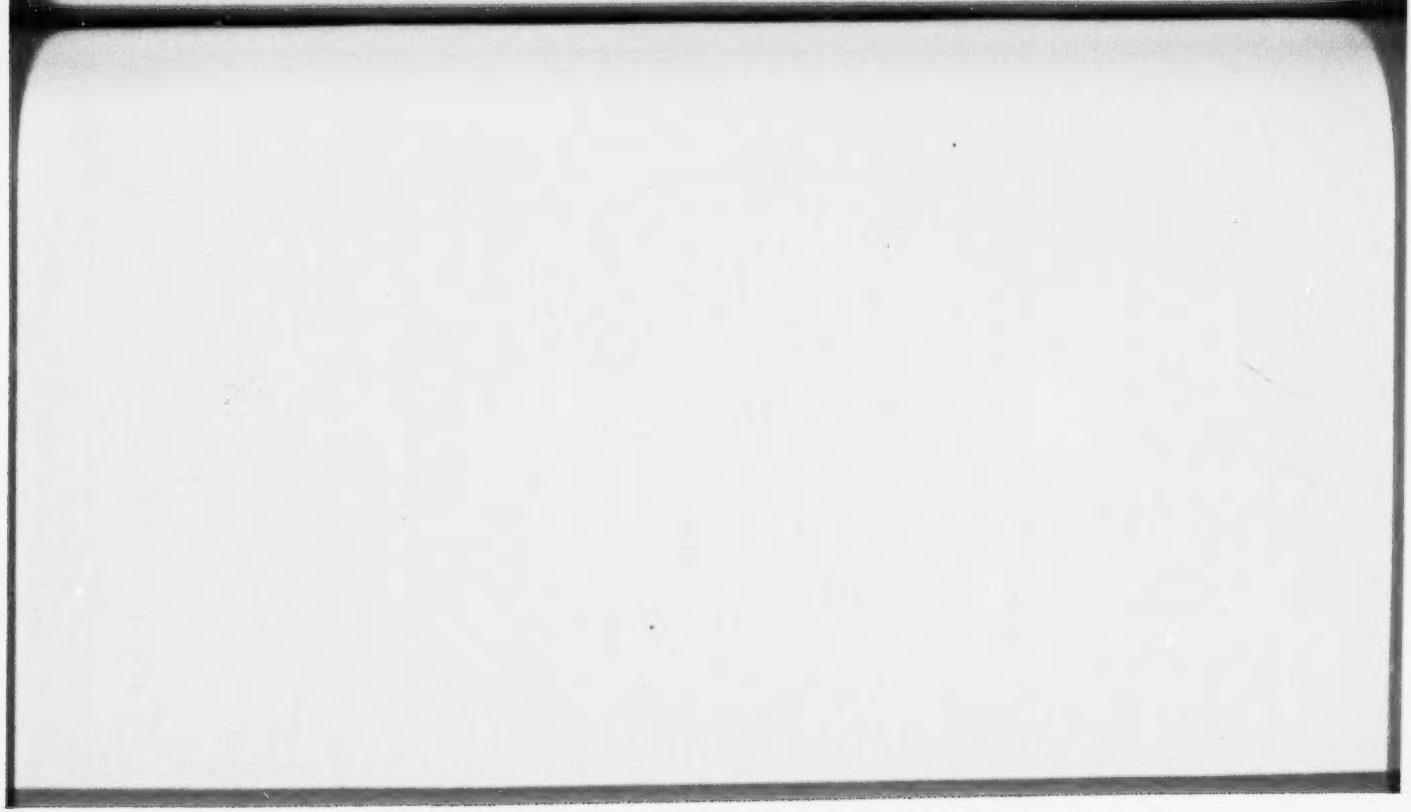
In this latter case t he shipowner was held to be respon sible for due diligence on the part of himself and his agents "to make the ship seaworthy *when she starts,*"

Third.

IT IS RESPECTFULEY SUBMITTED THAT THE DECREES OF THE UNITED STATES CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED, WITH INTEREST AND COSTS.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Smillie & Winter.

WILHELMUS MYNDERSE,
Advocate.



Supreme Court of the United States.

No. 5.—October Term, 1899.

James Knott, Petitioner,
vs.
The Botany Worsted Mills and Henry P. Winter and Charles F. Smillie.

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[October 22, 1900.]

Mr. Justice Gray delivered the opinion of the Court.

The Botany Worsted Mills, a corporation of New Jersey, and Winter and Smillie, a firm of merchants in the city of New York, respectively owners of two separate lots of bales of wool, shipped at Buenos Ayres for New York on board the steamship Portuguese Prince, severally filed libels in admiralty *in personam* in the District Court of the United States for the Southern District of New York, against James Knott, the owner of the vessel, to recover for damage caused to the wool by contact with drainage from wet sugar which also formed part of her cargo.

The Portuguese Prince was a British vessel, belonging to a line trading between New York and ports in the River Plata, Brazil and the West Indies, loading and discharging cargo and having a resident agent at each port. The bills of lading of the wool, signed at Buenos Ayres, December 21, 1894, gave her liberty to call at any port or ports to receive and discharge cargo, and for any other purpose whatever; and purported to exempt the carrier from liability for "negligence of masters or mariners;" "sweating, rust, natural decay, leakage or breakage, and all damage arising from the goods by stowage, or contact with, or by sweating, leakage, smell or evaporation from them;" "or any other peril of the seas, rivers, navigation, or of land transit, of whatsoever nature or kind; and whether any of the perils, causes or things above mentioned, or the loss or injury arising therefrom, be occasioned by the wrongful act, default, negligence, or error in judgment of the owners, masters, officers, mariners, crew, stevedores, engineers and other persons whomsoever in the service of the ship, whether employed on the said steamer or otherwise, and whether before, or after, or during the voyage, or for whose acts the shipowner would otherwise be liable; or by unseaworthiness of the ship at the beginning, or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness." Each bill of lading also contained the following clause: "This contract shall be governed by the law of the flag of the ship carrying the goods, except that general average shall be adjusted according to York-Antwerp Rules, 1890."

The facts of the case are substantially undisputed. The bales of wool of the libellants were taken on board at Buenos Ayres, December 21-24, 1894, and were stowed on end, with proper dunnage, between decks near the bow, and forward of a temporary wooden bulkhead, which was not tight. The vessel, after touching at other ports, touched on February 19, 1895, at Pernambuco, and there took on board two hundred tons of wet sugar, (from which there is always drainage,) which was stowed, with proper dunnage, between decks, aft of the wooden bulkhead. At that time the vessel was trimmed by the stern, and all drainage from the sugar, flowing aft, was carried off by the scuppers, which were sufficient for the purpose when the vessel was down by the stern, or on even keel in calm weather. There was no provision for carrying off the drainage in case it ran forward. She discharged other cargo at Para; and on March 10, when she left that port, she was two feet down by the head. She continued in this trim until she took on additional cargo at Port of Spain, where the error in trim was corrected, and she left that port on March 18, loaded one foot by the stern. It was agreed by the parties that there was no damage to the wool by sugar drainage until she was trimmed by the head at Para; that the wool was damaged, by sugar drainage finding its way through the bulkhead and reaching the wool, at Para, or between Para and Port of Spain, and not afterwards; that, after she was again trimmed by the stern at Port of Spain, none of the drainage from the sugar found its way forward; and that the court might draw inferences.

The District Court entered a decree for the libellants. 76 Fed. Rep. 582. That decree was affirmed by the Circuit Court of Appeals. 51 U. S. App. 467. The appellant then obtained a writ of certiorari from this court. 168 U. S. 711.

Before the act of Congress of February 13, 1893, c. 105, (27 Stat. 445,) known as the Harter Act, it was the settled law of this country, as declared by this court, that common carriers, by land or sea, could not by any form of contract exempt themselves from responsibility for loss or damage arising from negligence of their servants, and that any stipulation for such exemption was void as against public policy; although the courts in England and in some of the States held otherwise. *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397; *Compania La Flecha* v. *Brauer*, 168 U. S. 104, 117, 118. In many lower courts of the United States it has been held, independently of the Harter Act, that a stipulation that a contract should be governed by the law of England in this respect was void, and could not be enforced in a court of the United States; but the point has not been decided by this court. Nor is it necessary for us now to decide that point, because these bills of lading were issued since the Harter Act, and we are of opinion that the case is governed by the express provisions of that act.

Upon the facts of this case, there can be no doubt that the ship was seaworthy, and that the damage to the wool was caused by drainage from the wet sugar through negligence of those in charge of the ship and cargo. The questions upon which the decision of the case turns are two:

First. Whether this damage to the wool was "loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery" of cargo, within the first section of the Harter Act; or was "damage or loss resulting from faults or errors in navigation or in the management of said vessel," within the third section of that act?

Second. Do the words, in the first section, "any vessel transporting merchandise or property from or between ports of the United States and foreign ports," include a foreign vessel transporting merchandise from a foreign port to a port of the United States?

Section 1 of that act is as follows: "It shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he or they shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import, inserted in bills of lading or shipping receipts, shall be null and void and of no effect." This section, in all cases coming within its provisions, overrides and nullifies any such stipulations in a bill of lading *Calderon* v. *Atlas Steamship Co.*, 170 U. S. 272.

By section 3, on the other hand, "if the owner of any vessel transporting merchandise or property to or from any port in the United States" shall exercise due diligence to make her in all respects seaworthy and properly manned, equipped and supplied, neither the vessel nor her owner, agent or charterer "shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel," &c. This section does but relax the warranty of seaworthiness in the particulars specified in the section. *The Carib Prince*, 170 U. S. 655; *The Irrawaddy*, 171 U. S. 187.

We fully concur with the courts below that the damage in question arose from negligence in loading or stowage of the cargo, and not from fault or error in the navigation or management of the ship—for the reasons stated by the District Judge, and approved by the Circuit Court of Appeals, as follows:

"The primary cause of the damage was negligence and inattention in the loading or stowage of the cargo, either regarded as a whole, or as respects the juxtaposition of wet sugar and wool bales placed far forward. The wool should not have been stowed forward of the wet sugar, unless care

was taken in the other loading, and in all subsequent changes in the loading, to see that the ship should not get down by the head. There was no fault or defect in the vessel herself. She was constructed in the usual way, and was sufficient. But on sailing from Para she was a little down by the head, through inattention, during the changes in the loading, to the effect these changes made in the trim of the ship and in the flow of the sugar drainage. She was not down by the head more than frequently happens. It in no way affected her sea-going qualities; nor did the vessel herself cause any damage to the wool. The damage was caused by the drainage of the wet sugar alone. So that no question of the unseaworthiness of the ship arises. The ship herself was as seaworthy when she left Para, as when she sailed from Pernambuco. The negligence consisted in stowing the the wool far forward, without taking care subsequently that no changes of loading should bring the ship down by the head. I must, therefore, regard the question as solely a question of negligence in the stowage and disposition of cargo, and of damage consequent thereon, though brought about by the effect of these negligent changes in loading on the trim of the ship." "The change of trim was merely incidental, the mere negligent result of the changes in the loading, no attention being given to the effect on the ship's trim, or on the sugar drainage." "Since this damage arose through negligence in the particular mode of stowing and changing the loading of cargo, as the primary cause, though that cause became operative through its effect on the trim of the ship, this negligence in loading falls within the first section. The ship and owner must, therefore, answer for this damage, and the third section is inapplicable." 76 Fed. Rep. 583–585; 51 U. S. App. 473.

In *The Glenochil*, (1896) Prob. 10, on which the appellant much relied, the negligence which was held to be within the third section of the Harter Act was, as said by Sir Francis Jeune, "a mismanagement of part of the appliances of the ship, and mismanagement which arose because it was intended to do something for the benefit of the ship, namely, to stiffen her, the necessity for stiffening arising because part of her cargo had been taken out of her." He pointed out that the first and third sections of the act might be reconciled by the construction, "first, that the act prevents exemptions in the case of direct want of care in respect of the cargo, and secondly, the exemption permitted is in respect of a fault primarily connected with the navigation or management of the vessel and not with the cargo." And he added that the court had had the same sort of question before it in the case of *The Ferro*, (1893) Prob. 38, and he adhered to what he there said, "that mere stowage is an altogether different matter from the management of the vessel." And Sir Gorell Barnes delivered a concurring opinion to the same effect.

The like distinction was recognized by this court in the recent case of *The Silvia*, 171 U. S. 462, 466.

The remaining question is whether the first section of the Harter Act applies to a foreign vessel on a voyage from a foreign port to a port in the United States.

The power of Congress to include such cases in this enactment cannot be denied in a court of the United States. The point in controversy is whether, upon the proper construction of the act, Congress has done so. That the third section does extend to such a vessel on such a voyage has been already decided by this court. *The Silvia*, above cited; *The Chattahoochee*, 173 U. S. 540, 550, 551.

It is true that the words of that section are not exactly the same in this respect, being "any vessel transporting merchandise or property to or from any port in the United States," whereas the corresponding words in the first section are "any vessel transporting merchandise or property from or between ports of the United States and foreign ports."

But the two phrases, as applied to the subject matter, are precisely equivalent, and are both equally applicable to a foreign voyage that ends, and to one that begins, in this country. In their usual and natural meaning, the words "from any port in the United States" include all voyages, whether domestic or foreign, which begin in this country; the words "to any port in the United States" include all voyages, whether domestic or foreign, which end in this country; and the words "between ports of the United States and foreign ports" include all foreign voyages which either begin or end here. The words of the third section, "to or from any port in the United States," express in the simplest and most direct form the intention to include voyages hither as well as voyages hence. And we find insuperable difficulty in the way of giving a different meaning to the words of the first section, "from or between ports of the United States and foreign ports." The words "from ports of the United States" would of themselves be sufficient to cover all voyages which begin here, whether they end in a domestic or in a foreign port; and the words "between ports of the United States and foreign ports" no more appropriately designate foreign voyages beginning here, then such voyages beginning abroad. The phrase of the first section is slightly elliptical; but it appears to us to have exactly the same meaning as if the ellipsis had been supplied by repeating the words "ports of the United States," so as to read "any vessel transporting merchandise or property from ports of the United States, or between ports of the United States and foreign ports." And no reason has been suggested why a foreign vessel should come within the benefit of the third section relaxing the warranty of seaworthiness, and not come within the prohibition of the first section affirming the unlawfulness of stipulations against liability for negligence.

Attention was called at the bar to the fact that in the act, as originally passed by the House of Representatives, the words of the third section were

"any vessel transporting merchandise or property between ports in the United States of America and foreign ports," and that for those words the Senate substituted the words as they now stand in the act; and it was argued that the change in this section, leaving unchanged the corresponding clauses in the first and other sections of the act, showed that those sections were not supposed or intended to include vessels bound from foreign ports to ports of the United States. But the argument fails to notice that the third section, as it originally stood, did not contain the words "from or," but covered only voyages "between ports in the United States and foreign ports;" and the more reasonable inference is that the change was made for the purpose of bringing domestic voyages within this section. See 24 Congr. Rec. 147–149, 173, 1181, 1291, 1292.

Attention was also called to the fourth section of the act, which makes it the duty of the owner, master or agent of "any vessel transporting merchandise or property from or between ports of the United States" to issue to shippers bills of lading containing a certain description of the goods; and to the fifth section, which provides that, "for a violation of any of the provisions of this act, the agent, owner or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars," and the amount of the fine and costs shall be a lien upon the vessel, and she may be libelled therefor in any District Court of the United States within whose jurisdiction she may be found. It was argued that this provision imposing a penalty would cover a refusal to give a bill of lading without the clauses prohibited by the first section; and could not extend to acts done in a foreign port out of the jurisdiction of the United States. But whether that be so or not, (which we are not required in this case to decide,) it affords no sufficient reason for refusing to give full effect, according to what appears to us to be their manifest meaning, to the positive words of the first section, which enact, as to "any vessel" transporting merchandise or property "between ports of the United States and foreign ports," that all stipulations relieving the carrier from liability for loss or damage arising from negligence in the loading or stowage of the cargo shall not only be unlawful, but "shall be null and void and of no effect."

This express provision of the act of Congress overrides and nullifies the stipulations of the bill of lading that the carrier shall be exempt from liability for such negligence, and that the contract shall be governed by the law of the ship's flag.

Decree affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

